HOSPITALITY INDUSTRY INSURANCE LITIGATION UPDATE - 2010

THE HOSPITALITY LAW CONFERENCE
FEBRUARY 9-11, 2011
HOUSTON, TX

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David P. Bender, Jr. specializes in insurance policy enforcement under business insurance programs, devoting his practice to evaluating business insurance claims and prosecuting insurance recovery litigation. He graduated from University of Notre Dame and received his Juris Doctor degree from the Southwestern University School of Law.

Practice Summary

The policyholders Mr. Bender typically serves include *Fortune 1000* corporations and corporate directors and officers, with special emphasis on construction, financial services and technology risks. Mr. Bender has represented numerous hospitality industry clients, large public and private corporations and tax exempt organization in coverage disputes against insurance carriers and joint powers agencies. He recently won a binding arbitration hearing against the London and Bermuda reinsurance markets on a significant coverage dispute involving the 2003 California wildfires.

Professional Honors

Mr. Bender holds Martindale-Hubbell's highest "AV" rating for professionalism and ethics. He is a member of the State Bar of California, Academy of Hospitality Industry Attorneys, the American Bar Association-Employment Section, and the National Association of College and University Attorneys.

Professional Publications

Mr. Bender has published articles for trade and legal publications including *D&O Advisor, The John Liner Review, The National Law Journal, Inside Supply Management, Builder & Developer, Construction Executive,* and *Today's Facility Manager*, to name but a few.

TABLE OF CONTENTS

I. SCOPE OF ARTICLE

The sluggish economic recovery continues to inject uncertainty into the market. The operating environment for the hospitality remains volatile. Careful selection of policies and attendant endorsements is now more important than ever.

As illustrated below, the deletion or insertion of just one term can mean the difference between a fully insurance-funded defense and having to fend off expensive and complex litigation without assistance. Furthermore, even with carefully crafted policies, without a coherent and company-wide risk management strategy, even the best policies can be underutilized or end up void.

This article addresses some recent insurance litigation in the context of the hospitality industry. It is intended as a summary to allow companies and their outside lawyers to identify new and emerging issues for implementing appropriate insurance-related practices and procedures. Insurance is a highly specialized area and companies should consult their experienced commercial insurance broker or outside insurance counsel with specific questions.

II. COVERAGE GAPS & CARRIER POSITIONS

A. Assault & Battery, Rape

1. *Piligra v. America's Best Value Inn*[1]

Susana Piligra consumed an excessive amount of alcohol and lost consciousness while at a hotel nightclub. One of the nightclub's employees escorted Piligra to a room on the second floor of the hotel. On their way to the room, they encountered an unknown man who offered to help out. The three of them went to Piligra's room, where the employee left the inebriated Piligra with the man.

Some time later, Piligra's friend went to Piligra's room to check on her. The door to Piligra's room was locked and the curtains were drawn. The friend unlocked the door and moved her hand past the latched security chain to partially open the curtain. She saw the man climb off Piligra with his pants down. Piligra was transported to a local hospital, where it was determined that she had been raped by the man while she was unconscious in her room.

Piligra sued both the hotel owner, Vantage, and its operating company, Dhan Laxmi, as well as their insurance company, Evanston, in Louisiana state court. Piligra alleged that Vantage and Dhan Laxmi negligently (1) transported her to a room without her consent; (2) failed to attend to her in a responsible manner as required by the innkeeper laws or as one who has assumed a duty of care; and (3) left her alone with an unknown male, thereby subjecting her to rape and other injuries.

[1] // *Piligra v. America's Best Value Inn*, 2010 WL 3894631 (La. App. Oct. 6, 2010).

Evanston moved for summary judgment, arguing that no coverage existed under the commercial general liability policy it issued to Vantage[2] and Dhan Laxmi on the basis of certain endorsements and exclusions. The lower court granted Evanston's motion for summary judgment, and Piligra and Vantage appealed.

The appellate court held the trial court did not err in granting Evanston's motion for summary judgment, pointing to three separate exclusions as each wholly barring coverage of Piligra's suit: (1) Assault and Battery Exclusions; (2) a Sexual Abuse and/or Molestation Exclusion; and (3) a Restaurant, Bar, Tavern, Night Clubs, Fraternal and Social Clubs Endorsement.

The main Evanston policy and two of its endorsements[3] contained similar Assault and Battery Exclusions concerning "bodily injury" "arising out of assault and/or battery, or out of any act or omission in connection with the prevention or suppression of such acts."[4] Although the exclusions did not use the word "rape," the court concluded that "[b]ecause rape is a battery and because the assault and battery exclusion in the Evanston policy is unambiguous, we find that the exclusion is applicable and precludes coverage for Ms. Piligra's injuries."[5]

The Evanston policy also contained a Sexual Abuse and/or Molestation Exclusion precluding coverage for "bodily injury" arising out of "[t]he actual or threatened abuse or molestation or licentious, immoral or sexual bahvior."[6] The court determined that "[r]ape clearly qualifies under the [policy's] sexual molestation exclusion."[7]

Lastly, the court found that the Restaurant, Bar, Tavern, Night Clubs, Fraternal and Social Clubs Endorsement precluded coverage of Piligra's suit under the Evanston policy. That endorsement excluded coverage for "bodily injury" arising out of "[a]ny act or omission by any insured, any employee of any insured… or any other persons respects [*sic*] … any act of assuming or not assuming responsibility for the well being, supervision or care of any person… suspected to be under the influence of alcohol."[8] Pointing to other cases holding that such similar provisions were unambiguous and did not violate public policy, the court determined that "Ms. Piligra's claim that Vantage and/or Dhan Laxmi assumed responsibility for her care after she became intoxicated fits squarely within the limitations of the liquor liability exclusion."[9]

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[2] // Evanston contended that Vantage was not a proper insured under the policy, but for the purposes of its opinion, the court assumed Vantage was an insured. *Id.* at *6, n.2.

[3] // The two endorsements were the Habitational Endorsement and the Restaurant, Bar, Tavern, Night Clubs, Fraternal and Social Clubs Endorsement. *Id.* at *3.

[4] // *Id. at* *2-*3.

[5] // *Id.* at *3.

[6] // *Id.* at *4.

[7] // *Id.*

[8] // *Id.* at *4-*5.

[9] // *Id.* at *5.

This case demonstrates why policyholders should not rely on the basic provisions of a CGL policy for coverage of incidents of rape or sexual misconduct, especially when involving intoxicated persons. The court held that Piligra's rape allegations were excluded on the basis of assault and battery exclusions, an abuse/molestation exclusion and a liquor liability endorsement.

B. Bacteria & Consumable Products

1. *Amco Ins. Co. v. Swagat Group, LLC*[10]

On January 14, 2006, Bonnie Leiser used the pool and the hot tub at the Best Western in Lincoln, Illinois. While in the pool and hot tub, Leiser came into contact with Legionella bacteria. As a result of that contact, she subsequently contracted Legionnaire's disease and sustained permanent injuries and damages.

In February 2006, Georgia Braucher also spent time by the pool and hot tub at the same Best Western. She, too, contracted Legionnaire's disease, which in this instance proved fatal.

Leiser and the family of Braucher brought suit against the owners of the Best Western in the U.S. District Court for the Central District of Illinois. Best Western's owners sought coverage under the commercial general liability policy issued to them by Amco. Amco responded with a declaratory relief action alleging it had no duty to defend or indemnify the owners due to a Fungi and Bacteria exclusion which precluded coverage for "bodily injury" "which would not have occurred… but for… [t]he actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of, and 'fungi' or bacteria on or within a building or structure, including its contents."[11]

Two of the Best Western's owners admitted that the Amco policy contained the above exclusion. Based on this admission, the court granted Amco's motion for judgment on the pleadings as against those owners. One owner, Swagat, did not admit to the language. Subsequently, Amco moved for summary judgment against Swagat.

The district court granted Amco's motion for summary judgment. In its opinion, the court stated that "all of the claims in the Braucher and Leiser lawsuits allege that guests of the Hotel suffered injuries after coming into contact with bacteria on the Hotel premises… The Court has also determined that the quoted bacteria exclusions encompass this type of liability."[12]

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[10] // *Amco Ins. Co. v. Swagat Group, LLC*, 2010 WL 325937 (C.D. Ill. Jan. 21, 2010).

[11] // *Id.* at *2.

[12] // *Id.* at *4.

2. *Westport Ins. Co. v. VN Hotel Group, LLC*[13]

While the court in *Swagat* had no problem applying the bacteria exclusion to the exposure to Legionnaire bacteria in an outdoor hot tub, the U.S. District Court for the Middle District of Florida *VN Hotel Group* was far more conflicted in applying a similar exclusion to similar facts.

Walter Cooper, Elizabeth Cooper and Andrew Wheatley contracted Legionnaire's disease from a spa tub at the Quality Suites Hotel in Orlando, Florida. They brought suit against the owners of the Quality Suites Hotel in connection with the damages they suffered as a result of contracting Legionnaire's disease. The owners, in turn, sought coverage under a commercial general liability policy issued to them by Westport.

Westport sued the owners, the Coopers and Wheatley for declaratory relief. Westport moved for summary judgment, contending that no coverage existed for the Cooper and Wheatley suits on the basis of pollution and bacteria exclusions in the Westport policy. The district court denied Westport's motion.

The court disagreed that the pollution exclusion applied to Legionnaire's bacteria. The court noted that, "[u]nlike Legionella bacteria, all of the enumerated examples of 'pollutants' are non-living and readily described as either 'solid, liquid, gaseous or thermal irritants or contaminants." Moreover, "[t]he distinction between Legionella bacteria and 'pollutants' is confirmed by the existence of separate exclusions for pollution and bacteria."[14]

The wording of the bacteria exclusion in the Westport policy was substantively identical to that of the Amco policy, in that it applied to bacteria "on or within a building or structure, including its contents." The court noted that the spa tub, as it was outside the interior of the hotel, did not constitute "contents" of a building. It was also unwilling to apply a broad definition of "structure" that would encompass a spa tub.[15]

The contradictory *Swagat* and *VN Hotel Group* opinions demonstrate that various jurisdictions can effectively create critical gaps in coverage merely through a divergent (or perhaps differently rigorous) reading of similar insurance provisions as applied to similar factual situations.

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[13] // *Westport Ins. Co. v. VN Hotel Group, LLC*, No. 6:10-cv-222-Orl-28KRS (M.D. Fla. Dec. 9, 2010).

[14] // The court also noted that, in any event, an exception to the pollution exclusion concerning "equipment that is used to heat water for personal use" would have provided for coverage even if the exclusion itself was applicable. *Id.* at pp. 10-11.

[15] // As with the pollution exclusion, the court noted that an exception to the bacteria exclusion barred its application. The exception provided that the exclusion did not apply fungi or bacteria "that are, are on, or are contained in, a good or product intended for bodily consumption." The court found that the spa tub and shower water were "goods" and that the both the spa tub and shower water were "intended for bodily consumption." *Id.* at pp. 14-17.

3. *Lorenzo v. Capitol Indem. Corp.*[16]

On March 28, 2006, Nancy Lorenzo suffered food poisoning after eating at Reza's Restaurant in Oak Brook, Illinois. On July 9, 2007, Lorenzo filed a person injury claim against Persian Foods, the chain operating a number of Reza's Restaurants around the state of Illinois. Lorenzo's complaint alleged that "on and prior to March 28, 2006, defendant REZA'S did process, prepare, distribute, sell and/or otherwise place into the stream of commerce certain foods, including a family style platter which included chicken, for purchase by the consumer public." At other points in Lorenzo's complaint, she identified the Oak Brook location in particular.[17]

Persian Foods was issued a commercial general liability policy by Capitol which provided coverage of "bodily injury" "arising out of 'your products' manufactured, sold, handled or distributed… [o]n, from, or on connection with the use of any premises described in the Schedule." The policy's "Locations Schedule" listed 15 addresses throughout Illinois. The Oak Brook location was not among them.[18]

Persian Foods tendered its defense to Capitol. Capitol refused to assume Persian Foods' defense on the ground that the Lorenzo suit involved a non-covered location. After Persian Foods failed to appear or answer Lorenzo's complaint, Lorenzo was awarded a $100,000 default judgment by the court. Persian Foods assigned to Lorenzo its rights under the Capitol policy. Lorenzo filed suit against Capitol alleging it had a duty to defend Persian Foods.

The trial court granted Lorenzo's cross-motion for summary judgment on the grounds that the language in her complaint against Persian Foods was ambiguous as to location because it used open-ended temporal language (i.e. "on or prior to March 28, 2006") and used terms like "storing" and "distribution" – suggesting actions which may have occurred at several Persian Foods locations, including those listed in the Locations Schedule.[19] Capitol appealed.

The appellate court reversed the lower court, finding no potential for coverage existed under the Capitol policy for the Lorenzo suit. The court noted that "[w]e are unwilling to read the words 'processed,' 'stored,' 'distributed,' and 'sold' so broadly as to encompass any possible location listed in the insurance policy, especially in light of the fact that Lorenzo specifically identified the location at which she was injured."[20]

Assuming that the omission of the Oak Brook location from the Locations Schedule was inadvertent, this case is a valuable reminder that policyholders must work closely with their brokers to protect themselves from needless and costly coverage gaps, and to ensure that the

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[16] // *Lorenzo v. Capitol Indem. Corp.*, 401 Ill.App.3d. 616 (2010).

[17] // *Id.* at 621.

[18] // *Id.*

[19] // *Id.* at 618.

[20] // *Id.* at 622.

insurance company is kept informed of all changes to the policyholder's business operations that could affect the needed scope of coverage.

C. Pollution

1. *Barney Greengrass, Inc. v. Lumbermans Mut. Cas. Co.*[21]

Barney Greengrass, known as the "Sturgeon King," is a renowned New York delicatessen and purveyor of fish and specialty gourmet foods. Greengrass operated his business out of a building which also included a number of co-ops. One of those co-ops was owned by Theodore Bohn.

From 1999 through 2002, Bohn alleged that "overpowering food odors" emanated from a commercial kitchen[22] exhaust vent underneath one of his windows and permeated his residence, making it "unusable." Bohn complained to the co-op management and board, but the situation was not resolved to his satisfaction. During this dispute, Bohn filmed "exhaust" and "smoke" emanating from the restaurant's vent.

In 2004, Bohn sued the co-op owners and managing agent in New York state court. The co-op then filed a third-party complaint against its commercial tenant, which in turn filed a fourth-party complaint against its subtenant, Greengrass.

Greengrass had purchased a commercial general liability policy from Lumbermens. The policy contained a pollution exclusion providing that no coverage was available for losses caused by "[a]ny solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste."[23]

In August 2006, Greengrass tendered defense of the Bohn action to Lumbermens. Lumbermens disclaimed any coverage of the Bohn action, arguing that coverage was precluded by the policy's pollution exclusion.[24] Greengrass commenced an action for declaratory relief against Lumbermans, and Lumbermans removed the action to the U.S. District Court for the Southern District of New York. Greengrass moved for summary judgment that Lumbermans had a duty to defend and indemnify him.

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[21] // *Barney Greengrass, Inc. v. Lumbermans Mut. Cas. Co.*, 2010 WL 3069560 (S.D.N.Y. 2010).

[22] // Bohn's complaint never specifically identified the name of the establishment from which the "odor," "smoke" and "exhaust" emanated, although the court treated the establishment as belonging to Greengrass. *Id.* at *5, *9.

[23] // *Id.* at *6.

[24] // Lumbermans also argued that there was no "occurrence" under the policy. This assertion was rejected by the district court in *Greengrass* on the basis that "even if the generation of odors was expected or intended in operating the restaurant, the alleged loss was 'unexpected, unusual, [and] unforeseen' from the insured's point of view." *Id.* at *4-*6.

The district court denied Greengrass' motion for summary judgment on the question of indemnity on the grounds that the underlying Bohn action was ongoing. However, the court did grant his motion for summary judgment that Lumbermans had a duty to defend against the Bohn action, as not all of Bohn's allegation fell within policy exclusions.

The court did not accept Lumbermans' assertion that "odors" fell within the scope of the pollution exclusion. It began by observing that, "[i]n construing pollution exclusion clauses, New York courts have demonstrated a general reluctance to apply such exclusions literally in cases that do not involve traditional environmental pollution."[25] In this case, "the term 'odors' was not included in the policy's definition of 'pollutants.'… If Lumbermans wanted 'odors' in general or 'operational odors' in particular to be included in the policy definition of 'pollution,' it could have drafted its exclusion accordingly."[26] Because Lumbermans had failed to do so, it interpreted any resulting ambiguity about the definition of "pollutant" in favor of the policyholder. Moreover, the court noted that "the critical distinction remains that these odors were not the sort of industrial environmental irritants or contaminants to which pollution exclusions typically apply."[27]

The court did agree with Lumbermans that, to the extent the damage alleged by Bohn was the result of "smoke" or "exhaust" emanating from Greengrass' restaurant – rather than "odor" – "these damage probably *would* be excluded from coverage by the pollution clause, which expressly lists 'smoke' as a 'pollutant.'"[28] However, because Lumbermans had not shown that the allegations in the underlying complaint were not "solely and entirely" within the policy's exclusions, they were covered.[29]

2. *Roinestad v. Kirkpatrick*[30]

Hog's Breath Saloon was a restaurant in Otero County, Colorado. As part of their routine cleaning of the kitchen, Hog's Breath employees poured greasy water into the sewer drain outside the bar.

In 2003, city employees Christopher Roinestad and Gerald Fitz-Gerald were working on cleaning out the sewer line near Hog's Breath. After opening the sewer manhole, Fitz-Gerald was overcome by the odor from hydrogen sulfide emanating from inside the manhole. Fitz-Gerald lost consciousness and fell into the manhole. Roinestad entered the manhole to rescue Fitz-Gerald. He, too, passed out from the hydrogen sulfide fumes. Both men were taken to the

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[25] // *Id.* at *7.

[26] // *Id.* at *8.

[27] // *Id.*

[28] // *Id.* at *9.

[29] // *Id.*

[30] // *Roinestad v. Kirkpatrick*, 2010 WL 4008895 (Colo. App. Oct. 14, 2010).

hospital, where they received hyperbaric oxygen therapy. Both of them suffered ongoing health effects from the incident, and, as a result of their injuries, had trouble maintaining employment.

Roinestad and Fitz-Gerald sued Hog's Breath for negligence, negligence per se, and off premises liability in Colorado state court. The district court found that Hog's Breath was liable to Roinestad and Fitz-Gerald.

Hog's Breath had purchased a commercial general liability policy from Mountain States. This policy included a pollution exclusion. The exclusion precluded coverage for "bodily injury" arising out of the "discharge, dispersal, seepage, migration, release or escape of pollutants" from a location "owned or occupied by" any insured or from any location "used by or for any insured… for the handling, storage, disposal, processing or treatment of waste." "Pollutants" were defined as any "irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemical and waste."[31]

Mountain States brought a declaratory relief action against Hog's Breath in Colorado federal court, alleging it had no duty to defend or indemnify its insured in connection with the injuries to Roinestad and Fitz-Gerald. Mountain States argued that the Roinestad and Fitz-Gerald litigation was not covered because it was the result of a discharge or dispersal of a pollutant by Hog's Breath employees, with the grease constituting the pollutant. The federal court granted Mountain States' motion for summary judgment that it had no duty to defend or indemnify Hog's Breath. Because Roinestad and Fitz-Gerald were not parties to the declaratory relief action, the federal court's decision was not binding on them.

Roinestad and Fitz-Gerald thereafter sought to garnish Hog's Breath's insurance policy in Colorado state court. Mountain States entered an appearance in the action, arguing that there was no coverage under the policy's pollution exclusion. The lower court granted Mountain States' motion for summary judgment, and Roinestad and Fitz-Gerald appealed.

The appellate court reversed, determining that the Mountain States policy indeed covered the injuries and damages suffered by Roinestad and Fitz-Gerald. The court noted that Mountain States offered no evidence that the hydrogen sulfide encountered by the men "was discharged at or from Hog's Breath or at or form any other premises, site, or location that was owned or occupied by, or rented or loaned to" Hog's Breath, as required by the pollution exclusion.[32] Moreover, Roinestad and Fitz-Gerald showed that hydrogen sulfide "occurs naturally in stagnant water, swamps, some mineral waters, volcanic gases, sulfur springs, crude petroleum, and natural gas."[33]

The court also held that the pollution exclusion was ambiguous when applied to the cooking oil and grease discharged by Hog's Breath employees. The exclusion described a "pollutant" as an

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[31] // *Id.* at *2.

[32] // *Id.* at *4.

[33] // *Id.*

"irritant or contaminant." As Mountain States did not contend the cooking oil and grease were "irritant," the court examined whether they were "contaminants" within the meaning of the exclusion. The court identified multiple definitions of "contaminants" adopted by courts, one of which encompassed cooking oil and grease, and one that did not. The court concluded that "the pollution exclusion at issue does not clearly and specifically alert an insured that coverage is excluded when an injury results from a sewer that is clogged by negligently dumped cooking oil and grease."[34]

The above cases demonstrate the often blurry line between liability which is covered and that which is not covered under a pollution exclusion. Each of the courts wrestled with exclusion provisions which contained terms that were ill-defined under precedent and meanings that were highly dependant on the facts of the case. Together, they exemplify the historical and practical considerations that courts frequently utilize in interpreting liability exclusions relating to a business' byproducts.

[34] // The court also noted that while the pollution exclusion could be read as treating all "waste" as a "pollutant," it could also be read to mean that "waste" is a pollutant only if its is "irritating or contaminating," thereby rendering it ambiguous. *Id.* at *7.

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TABLE OF CONTENTS

INTRODUCTION

A business can use property insurance to limit its loss in two ways. First, it is ensuring the business obtains all necessary coverage and covering all property at a realistic cost to replace it. Obtaining the amount of coverage to truly make a business whole after a loss may require several insurance policies, a visual inspection, and the expertise of an engineer or contractor. Second, a loss can be limited by working with the insurer in the event of a catastrophe. An insurer may approve mitigation costs even before a storm if the opportunity is presented. Mitigation efforts could make a tremendous difference in the amount of damage a client sustains and in the recovery time and process. Likewise, having experienced counsel and public adjusters immediately after a catastrophe can expedite a full recovery with the insurer and even preclude further loss for the business. One of the inherent, but less obvious costs of a loss, is the emotional toll of seeing one's livelihood or life's work devastated. Consumer advocates experienced in this area can expedite full or partial payments, recommend trusted resources, and curtail negligent or bad faith actions by an insurer. As with the physical aspects for surviving a catastrophe, the key to financial survival is preparation.

This is a selection of recent property casualty coverage cases from across the country. It is intended to inform those in the hospitality industry of potential issues in obtaining property insurance and in presenting or litigating a claim. Of course, each jurisdiction is bound by its own procedures and substantive law. Companies should consult their own insurance counsel or broker with specific questions.

PROPERTY CASUALTY COVERAGE

A. Misrepresentation in the Application

1. *Grenoble House Hotel v. Hanover Insurance Company* [1]

The Grenoble House Hotel was severely damaged during Hurricane Katrina. Grenoble House filed claims with Hanover for property damage at 323, 325, and 329 Dauphine Street, New Orleans, Louisiana, damage to the contents of buildings at those addresses, and business interruption losses. Eventually, Hanover paid the limits on the contents and business interruption coverages, but Grenoble House was not satisfied with the amount received for the property damage or the way Hanover handled the claims, and Grenoble House filed suit.

Hanover filed a motion for summary judgment, arguing that Grenoble House misrepresented that it owned the property located at 329 Dauphine Street in order obtain coverage, when, in fact, it leased the property. Hanover argued that based on that material misrepresentation all of Grenoble House's claims should be dismissed. Alternatively, Hanover argued that all claims arising from or related to the particular building located at 329 Dauphine Street should be dismissed.

[1] *Grenoble House Hotel v. Hanover Insurance Company*, 2010 WL 2985789 (E.D. La. July 26, 2010).

As federal jurisdiction in this case was based on diversity of citizenship, 28 U.S.C. § 1332, Louisiana insurance law controlled the issue. The applicable Louisiana statute provided:

> .... no oral or written misrepresentation or warranty made in the negotiation of an insurance contract, by the insured or in his behalf, shall be deemed material or defeat or avoid the contract or prevent it attaching, unless the misrepresentation or warranty is made with intent to deceive.

La.Rev.Stat. 22:619(a). Accordingly, Hanover had the burden to prove: "(1) the statements made by the insured were false; (2) the misrepresentations were made with the actual intent to deceive; and (3) the misstatements materially affected the risk assumed by the insurer." *Dean v. State Farm Mutual Automobile Insurance Company*, 975 So.2d 126, 132 (La.App. 4th Cir.2008) *citing Cousin v. Page*, 372 So.2d 1231, 1233 (La.1979). The District Court held that Hanover failed to meet this burden, as Hanover presented no evidence that Grenoble House ever represented that it owned the property. Though the "owner" box was checked on the interest portion of a "Commercial Insurance Application" identifying Grenoble House as the applicant for insurance for 329 Dauphine Street, there was no evidence that a representative of Grenoble House signed the application or provided the information that it was the "owner" of the property. Thus, Hanover failed to prove that Grenoble House made a false statement, so summary judgment was precluded.

Moreover, the Court held that even assuming *arguendo* that Grenoble House misrepresented that owned the disputed property, Hanover failed to prove that Grenoble House misrepresented that fact with an intent to deceive and that the misstatement materially affected Hanover's decision to assume the risk. The facts that the managing partner of Grenoble House was formerly an insurance agent and that the "policy premium and coverages would have been different for a leased building as opposed to a building owned by the insured," were not sufficient evidence to pass summary judgment.

While the hotel owner's alleged misrepresentation on the application in this case was not found to preclude recovery as a matter of law, a minor variation in the facts or court could have lead to a different outcome. To preclude this potential problem, business owners and representatives should carefully scrutinize all application material, even if completed by an insurance agent or broker, for accuracy.

B. Additional Insured

1. *Ramparts, Inc. v. Fireman's Fund Insurance Company*[2]

Ramparts owns and operates the Luxor Hotel & Casino in Las Vegas, Nevada. Luxor entered into a lease agreement with Heptagon, in which Heptagon agreed to construct, develop, and operate a restaurant on the mezzanine level in the Luxor Hotel. Heptagon purchased a "package insurance policy" from Fireman's Fund. As the opening of the restaurant grew near,

[2] *Ramparts, Inc. v. Fireman's Fund Insurance Company*, 2010 WL 2326072 (D.Nev. June 07, 2010).

Heptagon's insurance policy with Fireman's Fund was canceled, and Heptagon purchased a new package policy from American Insurance Company, a subsidiary of Fireman's Fund. Apparently, Heptagon changed the policy in anticipation of shifting from a company preparing to open a business to a company that actually does business.

A little more than a year after opening, the restaurant floor collapsed and dropped almost a foot, damaging the structures of both the restaurant and the Luxor Hotel. Ramparts and Heptagon paid to repair the structural deficiencies and damage to their respective properties, and, less than a month later, the restaurant and the affected portions of the hotel reopened.

Heptagon filed a claim for loss of income and property damage under its insurance policy with American Insurance. Heptagon and American Insurance later settled the claim. Thereafter, Ramparts submitted a claim for indemnification "as an additional insured" under Heptagon's initial insurance policy with Fireman's Fund and its subsequent policy with American Insurance. Fireman's Fund denied the claim on the grounds that it cancelled Heptagon's policy prior to the accident. American Insurance also denied Rampart's claim.

The court granted summary judgment in favor of Fireman's Fund because Rampart's failed to meet its burden of proof. Ramparts provided no evidence to indicate it was entitled to coverage under the Fireman's Fund policy; it did not even provide the Court with a copy of the insurance policy. The certificate of insurance indicating that Heptagon took out an insurance policy from Fireman's that named Ramparts as an additional insured was not sufficient. Without the policy, the Court could not determine whether there was coverage or whether any of Ramparts' claims had merit.

Moreover, the parties' actions indicated that the American Insurance policy, not the Fireman's Fund policy, was effective at the time of the loss. Heptagon settled with American Insurance and Rampart's claims tracked the language of the American Insurance policy, which it provided to the court.

The court also granted Ramparts' request for a declaration stating that it was an additional insured under Heptagon's insurance policy with American Insurance. The court noted that insurance policy provided for additional insureds and defined an additional insured as any party that has entered into a written contract with Heptagon in which Heptagon agrees to add that party "as an additional insured under this policy." As Heptagon agreed in the original lease agreement to add Ramparts as an additional insured, the insurance policy clearly established that Ramparts was an additional insured.

C. Additional Coverage Endorsement

1. *Merlyn Vandervort Investments, LLC, d/b/a Jeremiah's Night Club v. Essex Insurance Company, Inc*[3]

[3] *Merlyn Vandervort Investments, LLC, d/b/a Jeremiah's Night Club v. Essex Insurance Company, Inc.*, 309 S.W. 3d 333 (Mo.App. S.D. 2010).

The insured owned and operated Jeremiah's Night Club, a bar, restaurant, and entertainment center. The business' building, personal property, and equipment on the premises, were destroyed by fire. The fire was believed to have been caused by faulty wiring. The insured had a commercial insurance policy and endorsement from Essex which provided "building" coverage with a limit of $1.2 million, "business personal property" coverage with a limit of $400,000, and "business income" coverage with a limit of $120,000. An endorsement titled "Mechanical, Electrical or Pressure Systems Breakdown," was described in the endorsement as "Equipment Breakdown Coverage with a limit of $1,600,000."

Essex paid the insured $1.2 million under the building coverage, $400,000 under the business personal property coverage, and $120,000 under the business income loss coverage. The insured sought further payment under the endorsement, asserting that the endorsement provided additional coverage with an additional limit of $1.6 million. Essex denied that claim, stating that fire damage was covered only in the policy and that the endorsement did not provide any additional coverage for the fire damage suffered. Essex contended that the endorsement "put back" coverage for certain policy exclusions, including mechanical, electrical, or pressure systems breakdown.

The insured filed suit, seeking damages against Essex for breach of contract and vexatious refusal to pay. Essex filed a motion for summary judgment, arguing that the endorsement did not provide additional coverage for damage caused by fire. The insured filed a cross-motion for partial summary judgment on the breach of contract claim, arguing the endorsement provided additional coverage and policy limits for damage caused by all "specified causes of loss," including fire.

The appellate court described the issue as "whether the endorsement, regardless of its limits, provides additional coverage beyond that provided by the policy in its unendorsed form for loss suffered by Insured in a fire." The relevant portion of the endorsement provided:

> 4. As respects to the [Loss form] the following applies:
>
> a. The following Definition, "Specified Causes of Loss," is deleted and replaced by the following:
>
> "Specified Causes of Loss" means the following: Fire; lightning; explosion; windstorm or hail; smoke; aircraft or vehicles; riot or civil commotion; vandalism; leakage from fire extinguishing equipment; falling objects; weight of snow, ice or sleet; water damage; mechanical, electrical or pressure systems breakdown;
>
> ....
>
> (3) Mechanical, electrical or pressure systems breakdown means direct damage to covered property from the following:

> (a) Mechanical breakdown, including rupture or bursting caused by centrifugal force;
>
> (b) Artificially generated electrical current, including electrical arcing, that disturbs electrical devices, appliances or wires;

The insured argued the definition of "specified causes of loss" in the endorsement included the word "fire," as did the definition of "specified causes of loss" in the unendorsed policy, so the endorsement provided additional fire coverage. Essex argued that an ordinary person of average understanding would not believe the endorsement provided additional fire coverage because it was already covered in the unendorsed policy. Further, Essex argued that because the endorsement's "specified causes of loss" added six words, "mechanical, electrical or pressure systems breakdown," it was the only peril covered. According to Essex, the endorsement only "put back" the cause that was specifically excluded in the unendorsed policy.

Looking to the policy, the court found no ambiguity in the endorsement's definition of "specified causes of loss." Contrary to Essex's argument that the endorsement did not provide any additional coverage for the peril of fire, the endorsement listed "fire" as one of the "specified causes of loss." Though the endorsement's definition of "specified causes of loss" did add coverage for "mechanical, electrical or pressure systems breakdown," the remaining itemized causes of loss were nearly identical to those listed in the unendorsed policy. Nothing in the endorsement indicated any of the identical "specified causes of loss" were excluded from the endorsement's coverage because they were already covered in the policy. Thus, the court concluded that an "ordinary person of average understanding could reasonably construe that since "fire" was listed in both the policy and the endorsement, there was additional coverage. Accordingly, this Court finds that, as a matter of law, the endorsement provided additional coverage for fire damage."

D. Business Interruption

1. *Catlin Syndicate Ltd. v. Imperial Palace of Mississippi, Inc.*[4]

Hurricane Katrina damaged the Imperial Palace casino, forcing it to shut down for several months. When it reopened, Imperial Palace's saw a tremendous increase in revenues, as many nearby casinos remained closed and gamblers had few choices. Imperial Palace submitted a claim to Catlin. Catlin agreed to pay the claim, but the parties disputed the amount of loss; Imperial Palace estimated its business interruption loss at approximately $80 million, while Catlin estimated the loss at around $6.5 million. The dispute was centered on the parties' different interpretations of the business interruption provision, which provided:

> Experience of the business-In determining the amount of the Time Element loss as insured against by this policy, due consideration shall be given to experience of the business before the loss and the probable experience thereafter had no loss occurred.

[4] *Catlin Syndicate Ltd. v. Imperial Palace of Mississippi, Inc.*, 600 F. 3d 511 (5th Cir. 2010).

Catlin argued that the business interruption provision limited Imperial Palace's recovery to net profits Imperial Palace would have likely earned, if Hurricane Katrina not struck the Mississippi Gulf Coast and damaged its facilities; in other words, Catlin argued that Imperial Palace's loss should be determined by pre-hurricane sales. Imperial Palace wanted the measure of recovery to include the increased revenue resulting from the damage to other casinos during Hurricane Katrina. Imperial Palace argued the correct analysis should be the net profits Imperial Palace would have earned if the hurricane occurred but had not damaged its facilities.

Relying on the reasoning of *Finger Furniture Co. v. Commonwealth Insurance Co.*, 404 F.3d 312 (5th Cir. 2005), case from Texas in which the *insurer* argued that post-storm sales should be taken into account to show that the insured did not actually incur any losses, the Court rejected Imperial Palace's argument. In *Finger Furniture*, the Court held that the proper method for determining loss under a nearly identical business interruption provision was to look at sales before the interruption occurred. The Court stated that "[h]istorical sales figures reflect a business's experience before the date of the damage or destruction and predict a company's probable experience had the loss not occurred," and that "[t]he strongest and most reliable evidence of what a business would have done had the catastrophe not occurred is what it had been doing in the period just before the interruption." The Court looked declined to consider post-interruption sales, noting that "the business-loss provision says nothing about taking into account actual post-damage sales to determine what the insured would have experienced had the storm not occurred."

Imperial Palace attempted to distinguish *Finger Furniture* on the fact that the insurer sought to take advantage of a post loss decrease in sales and because a "favorable conditions clause," which prohibited consideration of post-loss business increases when determining the amount of business-interruption losses, might have existed in that case. The Court found those facts would not change the analysis of the provision at issue.

Imperial Palace also argued Catlin's interpretation of the business-interruption provision changed the "had no loss occurred" phrase into "had no occurrence occurred." Imperial Palace argued that the Court should disentangle the loss from the occurrence and determine loss based on a hypothetical in which Hurricane Katrina hit, damaged all of Imperial Palace's competitors, but left Imperial Palace intact. Though the Court agreed that the loss was distinct from the occurrence in theory, the Court held that the two were "inextricably intertwined" under the language of the provision. Without specific language in the policy instructing otherwise, the Court declined to interpret the business interruption provision so that the loss caused by Hurricane Katrina could be distinguished from the occurrence of the hurricane itself.

2. *B.S.S.B., Inc. v. Owners Insurance Company*[5]

Owners issued B.S.S.B. an insurance policy which provided property coverage to B.S.S.B. for a hotel it owned. The hotel was damaged by a wind and rain storm, and B.S.S.B. notified Owners of the damage. B.S.S.B. hired a public adjuster, who submitted a proof of loss to Owners. The public adjuster calculated the cost to replace the damaged parts of the hotel was $85,127.85 and testified that repairs to the property could be completed in three months.

[5] *B.S.S.B., Inc. v. Owners Ins. Co.*, 2010 WL 320229 (M.D.Ga. January 20, 2010).

Owners' representative concluded the only covered damage was in the hotel's lobby and restaurant, and the total amount owed to B.S.S.B. was $19,679.09 (B.S.S.B.'s deductible payment would reduce Owners' obligation to $17,179.09). He sent a letter to B.S.S.B.'s public adjuster explaining that Owners was only obligated to pay the actual cash value of the property loss, totaling $9,336.99, until the damages were actually repaired.

On September 5, 2007, Owners issued B.S.S.B. a check for $9,366.99 for the actual cash value of the damaged property found in the hotel's lobby restaurant. The same day, the public adjuster submitted another proof of loss to Owners claiming $222,873.31.

Owners' representative responded that B.S.S.B. was not entitled to recover for lost income caused by the storm because the hotel could rent out its rooms to guests. He further stated that Owners would consider a claim for loss of business income if B.S.S.B. submitted supporting documentation "that warrants [the claim] to be paid."

On September 10, 2007, the public adjuster asked Owners to pay B.S.S.B. for losses under the policy's loss of business income provision. According to the public adjuster, the hotel had no income since July 14, 2007, and he believed B.S.S.B. was entitled to recover $315,330 for twelve months of lost revenue. B.S.S.B. was unsatisfied with Owners' responses and feared losing hotel to foreclosure.

B.S.S.B. made a settlement offer to Owners on November 7, 2007 for $603,862.45; Owners declined.

Owners did not pay B.S.S.B. any additional money March 10, 2008, after B.S.S.B. completed voluntary Chapter Thirteen bankruptcy. As part of the bankruptcy settlement, Owners' March 10, 2008, payment of $59,924.80, which included $37,085.25 to cover B.S.S.B.'s loss of business income for five months, went to a creditor. The loss of business income amount was determined by certified public accountant who reviewed the hotel's income, sales, and use tax returns, its monthly financial statements for 2006 and 2007, and the hotel's yearly financial statements for 2005 through 2007.

On July 11, 2008, B.S.S.B. filed a complaint against Owners, seeking additional payment for loss of business income and extra expenses, damages resulting from bad faith, consequential damages, and reasonable attorney's fees claims. Owners filed a Motion for Summary Judgment, seeking judgment as a matter of law on all of B.S.S.B.'s claims.

Regarding the business income claim, B.S.S.B. argued it was entitled to receive loss of business income payments until March 10, 2008, the date that Owners paid the property damage claim. Without payments from Owners, B.S.S.B. argued it could not complete the repairs. Owners argued that B.S.S.B. admitted it could complete repairs within three months time, so the five months of lost income Owners paid was actually more than it owed.

The Court was faced with the issue of whether coverage extended until the date that Owners actually paid the property damage claim. The policy provided that coverage ended on

the date that the B.S.S.B. "could" restore its operations. The Court interpreted the word "could" as meaning that coverage existed "for the period of time the repairs, if they were made, would reasonably take to complete." The court reasoned if Owners were required to provide coverage until B.S.S.B. could afford repairs or until it made payment on a property claim, then B.S.S.B. would have had an incentive to delay settling its property damage claims. Also, the court reasoned that coverage would be inequitable because the amount paid under the policy would depend on insured's financial means to make the repairs. As B.S.S.B.'s public adjuster admitted that the repairs could be completed within three months, the court agreed with Owners that B.S.S.B. was entitled to three months of lost business income.

B.S.S.B. argued that its lost profits exceeded $37,085.25 based on the public adjuster's projected revenue report, the hotel's tax bills, and an affidavit itemizing the normal monthly operating expenses of the hotel. The public adjuster first determined the percentage increase in revenue for each month in 2006 from each month in 2005. Then multiplied the monthly incomes in 2006 by the percent increase to project monthly revenues in 2007. The court held this method was problematic because the calculations did not include the hotel's revenues prior to 2005, so they were not sufficient. Likewise, the tax statements were not sufficient to prove that B.S.S.B. would have earned more than $37,085.25.

The Court independently reviewed the tax statements and other record evidence showing B.S.S.B.'s gross monthly income in 2005, 2006, and 2007, and held that it could not find it was reasonably certain that B.S.S.B.'s lost income for three months following the storm would have exceeded $37,085.25. The court found it significant that the total revenue of the hotel from July to October in 2005 was $21,950.46, and the total revenue from July to October in 2006 was $27,026.58.

The court found several problems with B.S.S.B.'s case. B.S.S.B. failed to present evidence of all of the hotel's operating costs and the hotel's recent history indicated that it was not a profitable venture. In 2005, the hotel made no profit and lost $36,641.07, and, in 2006, the hotel made a profit of $5,138.29. The court explained, "[o]rdinarily lost profits may be recovered only if the business "has a proven track record of profitability."

3. *Ski Shawnee, Inc. v. Commonwealth Insurance Company*[6]

A bridge collapsed on Hollow Road in Shawnee-on-Delaware, Pennsylvania, and the Pennsylvania Department of Transportation ("PENN DOT") closed Hollow Road to the public on February 9 and 10, 2008, during which the bridge was repaired. Hollow Road was the main route to enter the Plaintiff's ski resort, providing access for approximately 70% of the resort's customers.

Ski Shawnee filed a claim for loss of business income with its insurer, Commonwealth. The policy at issue provided:

[6] *Ski Shawnee, Inc. v. Commonwealth Insurance Company*, 2010 WL 2696782 (M.D.Pa. July 06, 2010).

> We [Commonwealth] will pay you [Ski Shawnee] for the actual loss of Business Income you sustain due to the necessary "Suspension" of your "Operations" during the "Period of Restriction." The "Suspension" must be caused by direct physical loss of or damage to property at the covered premises at the named locations stated in either Coverage Part II or Coverage Part III Declarations and for which a Business Income Limit of Insurance is shown in the Declarations.

The policy defined "suspension" as "[t]he slowdown or cessation of your business activities." "Covered Property" included Buildings, Business Personal Property (such as furniture and equipment), and Personal Property of Others. The policy also included coverage for:

> [T]he actual loss of Business Income you [Ski Shawnee] sustain and necessary Extra Expenses you incur caused by action of civil authority that prohibits access to the covered premises at the named locations stated in either the Coverage Part II or Coverage Part III Declarations due to direct physical loss of or damage to property adjacent to the covered premises.

Ultimately, Commonwealth denied the claim and Ski Shawnee filed suit alleging breach of contract and bad faith.

The court held that the business income provision did not apply because the loss was not the result of a "direct physical loss of or damage to property at the covered premises." The bridge was not Ski Shawnee's property. The court next considered whether PENN DOT's actions prohibited access to the resort. Generally, when an action of a civil authority completely shuts down access to a party's premises, federal courts have held that coverage in insurance policies similar to Ski Shawnee's is triggered. When an action of a civil authority merely hinders access to the covered premises, without completely prohibiting access, federal courts have generally held that such action is not covered under similar policies. Ski Shawnee's customers were able to access the resort from alternate routes on the two days in question. As there was not a complete inability to access the resort or a forced closing by a civil authority, the civil authority coverage at issue did not apply.

4. *Aztar Corp. v. U.S. Fire Insurance Company*[7]

In 2002, Aztar began an extensive expansion at a site adjacent to its Tropicana resort. A walkway and valet bridge would connect the twenty-seven story expansion to the Tropicana, and it was scheduled to open on April 15, 2004.

On October 30, 2003, six floors of the expansion collapsed, causing a seven month delay in using the expansion. Also, the New Jersey government temporarily shut down the main entry street to the Tropicana, a pedestrian bridge, the Tropicana's bus terminal, an existing parking

[7] *Aztar Corp. v. U.S. Fire Insurance Company*, 224 P. 3d 960 (Ariz.App. 1st Div. 2010).

structure, and the Tropicana's west hotel tower. The Tropicana did not sustain any physical damage from the collapse and remained fully operational aside from the temporary access closures ordered by New Jersey authorities. In the months following the collapse, the Tropicana lost $105,000,000, for which it submitted claims to its insurance carriers to cover loss from the collapse and interruption of the Tropicana's business.

Regarding coverage for business disruption, the policy at issue covered "loss resulting directly from necessary *interruption of business, whether total or partial*." Parsing the language of the provision and defining the terms as they are commonly understood, the court held that the term "business" has a meaning broader than "use of premise," and the term "business" was not limited to the "operation" or "ability to use" one's premises. The phrase "total or partial" made clear that any stoppage, or hindrance, need not impact the entire "business" but only a portion. Thus, the policy at issue could provide coverage for the business disruption experienced by the Tropicana.

Aztar also sought to recover loss from a decrease in anticipated patronage under the policy's contingent business interruption provision. This was the loss caused by unrealized anticipated profits at the hotel and casino by new customers who would have patronized the expansion and then the existing Tropicana, had the expansion been completed. The provision of the policy at issue stated:

> Loss resulting from the necessary interruption of business conducted by the Insured, and the necessary extra expense incurred by the Insured, subject to a sublimit of liability of $50,000,000 per occurrence, caused by damage or destruction by a peril not excluded herein occurring during the term of this policy to real or personal property of the Insured's suppliers or customers or of contributing or recipient properties of the Insured.

The court parsed the language of this provision and held that the ordinary meaning of "contributing property" is property presently in operation or production and adding to an insured's business when the loss occurs. As the expansion collapsed before it was completed and open for business, it was not contributing property within the ordinary meaning of the term, so the contingent business interruption provision of the policy did not cover the alleged contingent loss.

The court also held that the policy's thirty-day period of extended coverage for loss sustained when damage to property within five miles of the insured's property or an order by civil authority causes impaired access to or egress, rather than the policy's 365 day period for extended indemnity coverage for restoration of the insured's business, applied to civil authority and ingress/egress claims. Aztar's assertion the 365 day period should apply would render the 30 day provision meaningless.

5. *WMS Industries, Inc. v. Federal Insurance Company*[8]

The insured manufacturer/lessor of electronic slot machines sued its property and business income insurer for bad faith, challenging insurer's determination as to amount of business income and extra expenses coverage for insured's hurricane-related reduction in business at its Mississippi distribution center and monitoring facility.

The policy provision at issue stated:

> *BI/EE Coverage*
> The following Premises Coverages apply only at those premises for which a Limit Of Insurance applicable to such coverages is shown in the Declarations.
>
> Except as otherwise provided, direct physical loss or damage must:
>
> • be caused by or result from a covered peril; and
>
> • be at, or within 1,000 feet of, the premises, other than a dependent business premises, shown in the Declarations.
>
> ...
>
> This actual or potential impairment of operations must be caused by or result from direct physical loss or damage by a covered peril to property, unless otherwise stated.
>
> This Premises Coverage applies only at those premises:
>
> • where you incur a business income loss or extra expense; and
>
> • for which a Limit Of Insurance for Business Income With Extra Expense is shown in the Declarations.
>
> *Dependent Business Premises*
>
> This actual or potential impairment of operations must be caused by or result from direct physical loss or damage by a covered peril to property or personal property of a dependent business premises at a dependent business premises.

The Court of Appeals held that loss from property damage under the BI/EE coverage provision had to be caused at listed premises of insured. As the property damage occurred at

[8] *WMS Industries, Inc. v. Federal Insurance Company*, 384 Fed. Appx. 372 (5th Cir. 2010)

various casinos that leased gambling equipment and services from the insured -- not at the insured's covered property -- the insured's claim failed.

E. Discovery/Sanctions

1. *Bray & Gillespie Management, LLC v. Lexington Insurance Company*[9]

The insured filed suit to obtain recovery for business interruption losses allegedly caused by Hurricane Jeanne. As the insured's property, the Treasure Island Resort, and the area surrounding the resort was successively hit by Hurricanes Charley, Frances, and Jeanne in 2004, the insured bore the burden to prove the resort was operating in the normal course of business after sustaining damage from Hurricane Frances, but before Jeanne hit. Lexington denied the claim and argued that normal business operations at Treasure Island had largely ceased after it was damaged by Hurricane Frances and that the majority of occupants at the resort after Hurricane Frances were personnel working to restore the resort and not guests in the normal course of business.

Lexington filed a Motion for Sanctions for the insured's failure to produce records or "folios" of each guest's stay at the resort. The "Treasure Island room folios" are compilations of data from various points of sale in and around the property which document a guest's stay and use of the hotel facilities. The folios could be used to determine, for example, whether a room was rented to a guest in the normal course of business or whether the room was used to house personnel in relation to post-hurricane repair efforts.

For years, Lexington repeatedly requested the insured to produce all Treasure Island room folios at issue. Since April 2008, the court issued three orders "clearly and unambiguously compelling production of all room folios." The insured produced some folios but offered weak excuses for its failure to produce all. The court held the insured's "inexcusable disregard for the authority of this Court and the larger civil discovery process" warranted sanctions:

> Thus, as the half-measure of allowing partial introduction of the room folios is untenable, the delay in the trial and the attendant expense to the Defendant is no remedy, and cost-only sanctions have proven ineffective, the Court finds that the most appropriate remedy is to DISMISS with prejudice Plaintiff's claim for damages arising from or related to any alleged interruption of business at the Treasure Island Property caused by Hurricane Jeanne.

F. Subrogation

1. *Amco Insurance Company v. Ninjin Japanese Restaurant*[10]

Ninjin leased property under a Standard Industrial Lease. Amco issued a property insurance policy to the lessor covering the property leased to Ninjin. There was a fire at the

[9] *Bray & Gillespie Management v. Lexington Insurance Company*, 2010 WL 55595 (M.D. Fla. January, 5, 2010).
[10] *Amco Insurance Company v. Ninjin Japanese Restaurant*, 2010 WL 2028537 (Cal.App. 2 Dist. May 24, 2010).

property caused by Ninjin's negligence, the lessor made a claim on the policy, and Amco paid the lessor $297,313.40.

Therafter, Amco sued Ninjin to recover the money paid to the lessor. Ninjin moved for summary judgment based on paragraph 8.5 of the lease, which provided:

> *Lessee and Lessor hereby release and relieve each other, and waive their entire right of recovery against the other for loss or damage arising out of or incident to the perils insured against* under paragraph 8.3, which perils occur in, on or about the Premises, *whether due to the negligence of Lessor or Lessee or their agents, employees, contractors and/or invitees*. Lessee and Lessor shall, upon obtaining the policies of insurance required hereunder, give notice to the insurance carrier or carriers that the foregoing mutual waiver of subrogation is contained in this Lease.

Amco opposed summary judgment on several grounds but submitted no evidence in opposition to the motion. Instead, Amco argued that other provisions of the lease created factual questions. The court rejected all of Amco's arguments.

The lease required property insurance, and Ninjin, as lessee, paid for it as a portion of the rent. Paragraph 8.5, the waiver of subrogation provision, clearly shows that the lessor and Ninjin intended that the property insurance was for their mutual benefit, and they did not intend for Ninjin be liable to the lessor for negligently caused damages to the property. According to California law, Ninjin was not liable to the lessor for fire damages caused by its negligence, and Amco had no right of subrogation to pursue Ninjin for the loss.

Amco also argued that Ninjin could not use the waiver of subrogation provision to avoid responsibility for its own negligence, as the lessor actually purchased the policy. The Court held that Amco's argument was based on the faulty premise that the lessor paid for the insurance and bore the burden of Ninjin's negligence. Pursuant to the lease agreement, however, the lessor purchased the insurance, but Ninjin paid for the insurance with its rent payments. Thus, Ninjin, not the lessor, bore the responsibility for its negligence. There was nothing contrary to California law in this arrangement.

The court also rejected Amco's argument that "the Waiver was conditioned upon Ninjin insuring against loss and indemnifying as required under the lease. The entire case is based upon Ninjin's failure either individually or through [its] carrier to perform this very task. The condition has not been met for any waiver." Amco presented no evidence that Ninjin failed to fulfill its duty to insure against loss as required under the lease.

In entering into commercial leases, businesses should ensure that subrogation provisions truly protect their interests and that they are valid and enforceable under the law of the jurisdiction in which the business is located.

CONCLUSION

This summary of recent property casualty coverage litigation is intended merely as an overview. It is important to remember that each jurisdiction may have its own procedure, that federal and state issues of pleading and proof may be different, and that the substantive law of each jurisdiction must be accounted for. Thus, a ruling or law applied in these example cases may not apply across the board. Experienced insurance counsel should be consulted for any specific questions.

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William F. “Chip” Merlin, Jr. represents policyholders. His practice focuses on insurance claim presentation and benefit recovery, insurance coverage, bad faith and wrongful claims conduct litigation. He is a Board Certified Civil Trial Lawyer and currently holds Bar certifications in Florida, Mississippi, Texas, Tennessee, and the District of Columbia.

A graduate of the University of Florida, School of Law in 1982 where he served as Executive Editor of the Law Review and on the Moot Court, he became a member of the Florida Bar in 1983. He briefly represented insurance companies in coverage litigation and since 1985 has dedicated his career to seeking justice for insurance policyholders in claim presentation and disputes with their insurance companies.

Mr. Merlin is the founder and President of the Merlin Law Group. The nineteen-attorney firm also limits its practice to the representation of policyholders. It maintains offices in Houston, TX, Coral Gables and West Palm Beach, FL, and its home office is in Tampa, FL. The firm represents

commercial, governmental, residential and private policyholders throughout the Gulf Region and as co-counsel nationwide.

Mr. Merlin was named a finalist and then received an Honorable Mention in the LexisNexis Insurance Law Center Person of the Year 2008 -Policyholder Attorney of the Year. He is routinely invited to be a featured speaker on insurance law at some of the nation's most prestigious conferences and seminars. He has addressed his peers at the American Bar Association, the American Association for Justice, and the Florida Justice Association. He has also presented before members of such organizations as the National Association of Public Insurance Adjusters (NAPIA), the Florida Association of Public Insurance Adjusters (FAPIA), the Community Associations Institute, and the Windstorm Network.

Because of the breadth and depth of his knowledge and experience, Mr. Merlin is frequently sought to provide comment and insight into current legal issues on the stage of the national media. He has appeared on Fox News, ABC News, CNN, and MSNBC on topics as diverse as freedom of speech, employee's and property owners' rights to privacy and slander and emotional distress.

Mr. Merlin has shared his wealth of knowledge of insurance law via articles he either authored or co-authored. Some of the titles include: Hurricane Coverage and Litigation Issues; Florida's New Valued Policy Law and the Question of Concurrent Causation; Rules of the Road – A Different Methodology For Proving Duty and Breach; Ten Things a Florida Public Adjuster Can Do to Raise Professionalism and Be More Successful; Disaster Preparedness: A Call to Action, Establishing the Right Trial Theme for Your Bad Faith Case. He contributes daily to discussion of property insurance law on his blog, propertyinsurancecoveragelaw.com.

Mr. Merlin's reputation for judiciously seeking fair and just treatment of those who put their faith in their insurance providers recently earned him a governor-appointed seat on Florida's Citizen's Property Insurance Corporation Mission Review Task Force.

Some of Mr. Merlin's other honors and peer recognition include:

- AV Rated by Martindale-Hubbell
- Best Lawyers in America
- Corporate Counsel's Best Lawyers in Insurance Law
- Florida Trend Magazine: Florida's Legal Elite
- Florida's SuperLawyers
- 2007 National Association of Public Insurance Adjusters Co-Person of the Year
- Outstanding Amicus Brief of the Year, United Policyholders,
- Eagle Talon Award, The Florida Justice Association (for upholding the highest ideals of Florida Trial Lawyers)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

GRENOBLE HOUSE HOTEL	**CIVIL ACTION**
VERSUS	**NO. 06-8840**
HANOVER INSURANCE COMPANY	**SECTION "K"(1)**

ORDER AND OPINION

Before the Court is the "Motion for Summary Judgment to Dismiss Plaintiff's Claims Due to Misrepresentation of Material Fact or, Alternatively, to Dismiss Plaintiff's Claims Arising Out of or Relating to the Property Located at 329 Dauphine Street." Having reviewed the pleadings, memoranda, and relevant law, the Court, for the reasons assigned, DENIES the motion.

BACKGROUND

On August 29, 2010 when Hurricane Katrina struck New Orleans, Hanover Insurance Company ("Hanover") had in effect a commercial lines policy of insurance insuring property known as the Grenoble House Hotel, a seventeen (17) suite hotel located in three separate buildings bearing the municipal addresses 323, 325, and 329 Dauphine Street, New Orleans, Louisiana. The policy provided coverage for damages to the buildings, contents, and business interruption. The policy listed Grenoble House Hotel, L.L.C. ("Grenoble House") as the named insured under the policy.

As a result of Hurricane Katrina, the buildings comprising the hotel as well as the contents of those buildings sustained damaged. Grenoble House made a claim under the policy for damage to the buildings and their contents as well as a claim for business interruption damages. Hanover

made a number of payments under the policy, and eventually tendered the policy limits on the contents coverage and the business interruption coverage.

Dissatisfied with Hanover's failure to tender its policy limits for property damage and the timing of the payments made by Hanover, Grenoble House filed suit against Hanover in state court seeking to recover additional damages for property damage and debris removal as well as statutory penalties and attorney's fees under Louisiana law. Thereafter defendant removed that suit to this Court.

Defendant now seeks to dismiss all of plaintiff's claims contending that because Grenoble House represented itself to be the owner of the property located at 329 Dauphine, when in fact it was the lessor, of the property, Grenoble House made a material representation in connection with the policy which voids the policy.

SUMMARY JUDGMENT STANDARD

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment should be granted "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law" Fed.R.Civ.P. 56(c). The party moving for summary judgment bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the record "which it believes demonstrate the absence of a genuine issue of material fact." *Stults v. Conoco*, 76 F.3d 651, 655 (5th Cir.1996) (citing *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 912-13 (5th Cir.) quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552- 53, 91 L.Ed.2d 265 (1986)). When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material

facts. The nonmoving party must come forward with "specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986); *Tubacex, Inc. v. M/V Risan*, 45 F.3d 951, 954 (5th Cir. 1995).

Thus, where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no "genuine issue for trial." *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. at 588, 106 S.Ct. at 1356-57. Finally, this Court notes that the substantive law determines materiality of facts and only "facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986).

LAW AND ANALYSIS

The "Commercial Property Conditions" portion of the policy at issue provides in pertinent part that:

> This Coverage Part is void in any case of fraud by you as it relates to this Coverage Part at any time. It is also void if you or any other insured, at any time, intentionally conceal or misrepresent a material fact concerning:
>
> 1. This Coverage Part;
> 2. The Covered Property;
> 3. Your interest in the Covered Property; or
> 4. A claim under this Coverage Part.

Doc. 33-2, p. HANO-00024. It is undisputed that Grenoble House does not own the property located at 329 Dauphine Street and that it is the lessor of that property. It is also undisputed that at all times relevant herein, there was in effect a lease between Grenoble House and Morere Family, LLC for the property located at 329 Dauphine Street. Defendant asserts that Grenoble House misrepresented that it owned the disputed property in order obtain coverage and that based on that

material misrepresentation all of plaintiff's claims should be dismissed. Alternatively, defendant contends that all claims arising from or related to the building located at 329 Dauphine Street should be dismissed.

Because federal jurisdiction is grounded on diversity of citizenship, 28 U.S.C. §1332, Louisiana insurance law governs this case. The applicable Louisiana statute provides that:

> . . . . no oral or written misrepresentation or warranty made in the negotiation of an insurance contract, by the insured or in his behalf, shall be deemed material or defeat or avoid the contract or prevent it attaching, unless the misrepresentation or warranty is made with intent to deceive.

La. Rev. Stat. 22:619(a).[1] Thus, under Louisiana law, for a misrepresentation to avoid coverage under an insurance policy, the insurer bears the burden of establishing all of the following: "(1) the statements made by the insured were false; (2) the misrepresentations were made with the actual intent to deceive; and (3) the misstatements materially affected the risk assumed by the insurer." *Dean v. State Farm Mutual Automobile Insurance Company*, 975 So.2d 126, 132 (La. App. 4th Cir. 2008) citing *Cousin v. Page*, 372 So.2d 1231, 1233 (La. 1979).

As noted earlier, there is no dispute that Grenoble House does not own the disputed property. However, defendant has not offered any evidence establishing that Grenoble House ever represented that it was the owner of the property. In support of its motion Hanover submitted a copy of a page of the "Commercial Insurance Application" identifying Grenoble House as the applicant for insurance for 329 Dauphine Street. The application has a column titled "Interest" which includes boxes for "owner" and "tenant." The "owner" box is checked. Significantly there is no evidence

[1] Pursuant to Act, No. 415 of 2008, the Louisiana legislature redesignated and renumbered La. Rev. Stat. 22:619 as La. Rev. Stat. 22:860, effective January 1, 2009.

that a representative of Grenoble House signed the application or provided the information that it was the "owner" of the property. Absent such evidence, defendant has failed to establish that Grenoble House made a statement that was false, and therefore, summary judgment is precluded.

Additionally, even assuming *arguendo* that Grenoble House misrepresented that it was the owner of the disputed property, Hanover has failed to prove that plaintiff misrepresented that fact with the actual intent to deceive and has failed to prove that the misstatement materially affected the risk assumed by defendant. With respect to proving intent to defraud under La. Rev. Stat. 22:619A, the Louisiana Supreme Court has stated:

> The courts of appeals in interpreting a similar provision in R.S. 22:619B have reasoned that strict proof of fraud is not required to show the applicant's intent to deceive, because of the inherent difficulties in proving intent. Intent to defraud must be determined from surrounding circumstances indicating the insured's knowledge of the falsity of the representations made in the application and his recognition of the materiality of his misrepresentations, or from circumstances which create a reasonable assumption that the insured recognized the materiality.

Cousin v. Page, 971 So.2d at 1213. Hanover has not produced any competent Rule 56 evidence demonstrating that Grenoble House recognized the materiality of the misrepresentation. Although Hanover represents that L.M. Palazzo, Jr., the managing partner of Grenoble House, is "a former Louisiana-licensed insurance agent and, as such, certainly possesses specialized knowledge of typical policy language, requirements, and general terms and conditions of insurance contracts" and that Mr. Palazzo's "insurance knowledge is complemented by three decades of owning and insuring real estate," no proof of these contentions was provided. Hanover's mere allegations are insufficient to entitle it to summary judgment.

Finally, the Court notes that Hanover has failed to offer any competent Rule 56 evidence

establishing that a misstatement regarding ownership would be "material." A misrepresentation is material "if the truth would have resulted in the insurer not issuing the policy of insurance or issuing the policy at a higher rate." *Abshire v. Desmoreaux*, 970 So.2d 1188, 1196 (La. App. 3rd Cir. 2007). Hanover urges that "Grenoble House may not have been eligible for the coverage it obtained for the building had Hanover known that Grenoble House did not own it" and that "[a]t a minimum, the policy premium and coverages would have been different for a leased building as opposed to a building owned by the insured." Doc. 33-1, p. 7. That contention way well be true, and if true may bar plaintiff's recovery; however, for purposes of this motion, Hanover has failed to submit competent Rule 56 evidence establishing that had Hanover known Grenoble House was the lessor, as opposed to the owner of the building at 379 Dauphine Street, it would have either declined to write the policy at issue or would have issued the policy only upon the payment of a higher premium. Therefore, defendant is not entitled to summary judgment. Accordingly, the motion is denied.

New Orleans, Louisiana, this 26th day of July, 2010.

STANWOOD R. DUVAL, JR.
UNITED STATES DISTRICT JUDGE

Back

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

RAMPARTS, INC., a Nevada corporation, d/b/a/ Luxor Hotel and Casino,

Plaintiff,

vs.

FIREMAN'S FUND INSURANCE COMPANY, a California corporation; THE AMERICAN INSURANCE COMPANY, an unknown entity; and DOES 1-50, inclusive,

Defendants.

Case No.: 2:09-cv-0371-RLH-LRL

O R D E R

(Motion for Summary Judgment–#22; Motion for Summary Adjudication–#23)

Before the Court is Defendants Fireman's Fund Insurance and American Insurance Company's **Motion for Summary Judgment** (#22), filed February 17, 2010. The Court has also considered Plaintiff Luxor Hotel & Casino's Opposition (#24), filed March 5, 2010, and Defendants' Reply (#27), filed March 22, 2010.

Also before the Court is Luxor's **Motion for Summary Adjudication** (#23), filed February 25, 2010. The Court has also considered Defendants' Opposition (#28), filed March 22, 2010, and Luxor's Reply (#29), filed April 8, 2010.

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BACKGROUND

Plaintiff owns and operates the Luxor Hotel & Casino in Las Vegas, Nevada. On December 15, 2006, Luxor entered into a lease agreement with Heptagon, a non-party to this action, in which Heptagon agreed to construct, develop, and operate a restaurant called the Cathouse Lounge on the mezzanine level in the Luxor Hotel. Shortly after signing the agreement, Heptagon demolished existing interior fixtures, designed and performed structural modifications, and installed new finishes, fixtures, and equipment on the property. Several months before opening the restaurant, Heptagon contacted an insurance broker in order to obtain insurance. After reviewing a number of options, Heptagon purchased a "package insurance policy" (a policy that includes both liability and property coverage) from Defendant Fireman's Fund. As the opening of the restaurant grew near, however, Heptagon's insurance broker apparently requested that changes be made to the insurance policy. According to Defendants, Heptagon's initial insurance policy was canceled and Heptagon was issued a new package policy from Defendant American Insurance Company—a subsidiary of Fireman's Fund. This policy was apparently rewritten because Heptagon was shifting from a company preparing to open for business to a company that actually does business.

Cathouse Lounge opened for business in December 2007. On February 26, 2008, during Cathouse Lounge's peak operating hours, part of the restaurant premises became overloaded with people and a portion of the structure began to buckle and fail. The Cathouse floor collapsed and immediately dropped almost a foot, damaging the structures of both the Cathouse Lounge and the Luxor Hotel. The restaurant and some portions of the hotel were immediately evacuated. Shortly thereafter, the Clark County Department of Building Services ordered Luxor to close the Cathouse Lounge and the damaged portions of the hotel so that the cause and extent of the damage could be identified. Luxor subsequently hired a number of internal and external experts who apparently determined that the Cathouse Lounge was not built to support the number of people that had been frequenting the restaurant. Both Luxor and Heptagon paid to repair the

structural deficiencies and damage to their respective properties, and on March 21, 2008, the restaurant and the affected portions of the hotel re-opened for business.

Heptagon subsequently made a claim for loss of income and property damage under its insurance policy with American Insurance. American Insurance investigated the accident and entered into a settlement agreement and release of claims with Heptagon on August 12, 2008. As part of the agreement, American Insurance paid Heptagon $499,877.84 for the loss of its property and income. Ten days later, on August 22, Luxor submitted a claim for indemnification "as an additional insured" under Heptagon's initial insurance policy with Fireman's Fund and its subsequent policy with American Insurance. (Dkt. #22, Mot. Ex. J.) Fireman's Fund denied this request, stating that it cancelled Heptagon's policy prior to the accident, and American Insurance denied this request, concluding that Luxor was not entitled to coverage under Heptagon's policy.

On January 14, 2009, Luxor filed suit in Nevada state court against Defendants seeking a declaration that (1) Luxor is an additional insured under Heptagon's insurance policies; (2) Luxor is entitled to insurance coverage for property damage as an additional insured; (3) Luxor is entitled to insurance coverage based on the "property of others" clause in the policies; (4) Luxor is entitled to coverage under the "business interruption and extra expenses" clause of the policies; and (5) Luxor is entitled to coverage under the "covered glass and foundations" clause of the policies. In addition to these claims for declaratory relief, Luxor brings claims for breach of contract, bad faith, and unfair claims practices. On February 25, Defendants removed the case to this Court based on the diversity of the parties. Both parties now move for summary judgment. For the reasons discussed below, the Court grants both parties' motions in part and denies them in part.

DISCUSSION

I. Fireman's Fund Policy

Both parties agree that Heptagon purchased a package insurance policy from Fireman's Fund. The parties dispute, however, whether this policy was in effect when the floor at

the Cathouse Lounge collapsed in February 2008. Defendants allege Fireman's cancelled this insurance policy in December 2007 at the request of Heptagon's insurance broker because the Cathouse Lounge was about to open for business, thus changing the nature of Heptagon's risks. In support of this assertion, Defendants provide the affidavit of Andrew Hymes, an underwriter for Fireman's, who testifies that the policy was cancelled. Based on this testimony, Defendants ask the Court to grant summary judgment as to all claims arising under the Fireman's Fund insurance policy.

Although Hymes' testimony alone does not justify summary judgment, the Court grants Defendants' motion because Luxor has provided no evidence to indicate it is entitled to coverage under the Fireman's Fund policy. First and most important, Luxor has not provided the Court with a copy of the insurance policy; it has merely provided a certificate of insurance indicating that Heptagon took out an insurance policy from Fireman's that named Luxor as an additional insured. Without an actual copy of the policy itself, the Court cannot determine whether there is coverage and whether any of Luxor's claims—especially its specific claims for declaratory relief—have merit. Because it is the plaintiff in this case, Luxor has the burden of either producing the insurance policy or explaining why it does not have a copy of the policy, neither of which it has done.

Second, the actions of the parties in this case indicate that the American Insurance policy is the effective policy at issue here. Heptagon entered into a settlement with American Insurance relating to the February 2008 accident, but there is no record of any such settlement under the Fireman's policy. In addition, Luxor purports to bring its claims under both the Fireman's policy and the American Insurance policy, but all of its requests for declaratory relief directly track the language of the American Insurance policy—a policy which Luxor has provided to this Court. These facts support the conclusion that the American Insurance policy, not the Fireman's policy, is the operative policy agreement in this case. Therefore, not only has Luxor not provided a copy of the insurance policy, but also the evidence indicates that at the time of the

accident, only the American Insurance policy was operative. Accordingly, the Court grants Defendants' motion for summary judgment in its entirety as it relates to Luxor's claims arising under the Fireman's policy. The Court also denies Luxor's motion for summary judgment in its entirety to the extent it seeks coverage under the Fireman's policy. The remainder of this Order will address Luxor's claims under the American Insurance policy.

II. American Insurance Policy

The parties do not dispute that at the time of the accident, Heptagon was insured under an insurance policy with American Insurance Company, a subsidiary of Fireman's Fund. Both parties now move for summary judgment on each of Luxor's claims under this policy. The Court addresses each of these claims as follows.

A. Declaratory Relief: Additional Insured

In its first claim for declaratory relief, Luxor seeks a declaration stating that it is an additional insured under Heptagon's insurance policy with American Insurance. The insurance policy provides for the possibility of additional insureds under the insurance agreement. The policy defines an additional insured as any party that has entered into a written contract with Heptagon in which Heptagon agrees to add that party "as an additional insured under this policy." (Dkt. #23, Ex. 22, FF 03119.) Importantly, Heptagon agreed in the original lease agreement to add Luxor as an additional insured: the contract states that Heptagon "is to name" Luxor "as additional insureds on all [insurance] policies, except for worker's compensation." (Dkt. #23, Ex. 23, FF 02734.) Nonetheless, as Defendants point out, additional insureds are entitled to coverage under the policy "only to the extent" they are held "liable for bodily injury, property damage, or personal and advertising injury caused by [Heptagon's] acts or omissions." (Dkt. #23, Ex. 22, FF 03119.)

The Court grants Luxor's motion for summary judgment on this issue because the insurance policy clearly establishes that Luxor is an additional insured. The policy states that any party Heptagon contracts with to be an additional insured is entitled to such status under the policy, and Heptagon clearly promised in the lease agreement to name Luxor as an additional

insured. The Court notes that this conclusion is bolstered by the fact that American Insurance's "Certificate of Liability Insurance" states that "Ramparts, Inc. dba: Luxor Hotel & Casino, its parent company, subsidiaries, and affiliates are named as additional insureds as required by written contract." (Dkt. #23, Ex 19.) Nonetheless, while the Court grants Luxor's motion for summary judgment on this point, it does so with the understanding that Luxor is an additional insured only to the extent it seeks indemnification for liability for bodily injury, property damage, or advertising injury caused by Heptagon's acts or omissions. Luxor's rights as an additional insured under the policy do not extend beyond this language.

B. Declaratory Relief: Property Damage

Luxor also asks the Court to declare that it is entitled to coverage as an additional insured for property damage it suffered as a result of the accident. After reviewing the terms of the insurance policy, the Court finds Luxor is not entitled to such coverage. As already noted, the insurance policy states that as an additional insured, Luxor is entitled to coverage "only to the extent [Luxor] is held liable for bodily injury, property damage, or personal and advertising injury caused by [Heptagon's] acts or omissions." (Dkt. #23, Ex. 22, FF 03119.) In this case, Luxor is not seeking coverage because it is being held liable by another party for personal injury or property damage; instead, it is seeking to obtain insurance proceeds directly as a result of Heptagon's alleged negligence. This is not what the insurance policy contemplates. Luxor is entitled to coverage as an additional insured only if someone recovers against Luxor, not if Luxor wants to recover as a claimant under the insurance policy. Because the additional insured coverage in this case applies solely to Luxor's potential liability, the Court grants Fireman's Fund's motion for summary judgment and denies Luxor's motion for summary judgment on its claim for declaratory relief.

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C. Declaratory Relief: Business Interruption, Extra Expenses, Covered Glass, and Damage to Foundation

Luxor also alleges it is entitled to recover under the insurance policy for damages suffered as a result of interruption to its business, extra expenses, and damage to its structural foundation. The Court grants Defendants' motion for summary judgment on this claim for the same reason it granted their motion regarding Luxor's claim for property damage. Although the policy permits Heptagon, the named insured, to recover these additional economic damages, this coverage does not extend to Luxor because Luxor is an additional insured only if it is held liable for damages caused by Heptagon's acts or omissions. As stated above, Luxor is not seeking indemnification for damages for which it could be liable; instead it is seeking to recover insurance proceeds as an injured party in this case. If Luxor wishes to recover these types of damages, it must do so as a claimant, not as an additional insured. Accordingly, the Court grants Defendants' motion for summary judgment and denies Luxor's motion for summary judgment on its claim for declaratory relief.

D. Declaratory Relief: Property of Others

Luxor also seeks a declaration that it is entitled to coverage based on a provision in the contract relating to other parties' property. The policy states that American Insurance will "cover the property of others while it is at a covered location" and that it will "cover such property against loss from a cause of loss we cover applying to your business personal property at the location." (Dkt. #23, Ex. 22, FF 03028.)[1] In order to determine whether this contractual provision applies to Luxor's property loss, the meaning of the relevant terms in this clause must be determined. The policy defines "property of others" as "property which does not belong to Heptagon." (Dkt. #23, Ex. 22, FF 02993.) It also defines "covered location" as the "Luxor Hotel & Casino at 3900 Las Vegas Blvd. South in Las Vegas, Nevada." (Dkt. #23, Ex. 22, FF 02993,

[1] As noted by Fireman's Fund, this insurance coverage is limited to $10,000. (Dkt. #23, Ex. 22, FF 03028.)

03020.) Finally, in identifying the "causes of loss" covered under the policy, the policy states that American Insurance will "pay for loss or damage caused by . . . collapse of a building or any part of a building caused only by . . . [w]eight of people or personal property." (Dkt. #23, Ex. 22, FF 03044.)

The Court finds Luxor is entitled to coverage under the "property of others" clause in the insurance contract, and it grants Luxor's motion for summary judgment to this effect. The parties do not dispute that the accident took place in the Luxor Hotel & Casino, that the collapse of the Cathouse Lounge was caused by the large number of people on the mezzanine level, and that Luxor suffered property damage as a result of the accident. This scenario falls directly under the insurance contract's definition of "property of others", "covered location", and "causes of loss." Based on this language, the Court concludes Luxor is entitled to coverage as one whose property was damaged as a result of an accident covered by the insurance policy. The Court therefore grants Luxor's motion for summary judgment and denies Defendants' motion for summary judgment on this claim for declaratory relief.

E. Breach of Contract and Bad Faith

Luxor alleges Defendants breached the insurance contract and acted in bad faith when they refused to cover Luxor as an additional insured under the insurance policy. Luxor asks the Court to grant summary judgment on these claims, but only as to liability: Luxor specifically asks the Court to reserve questions regarding damages and other remedies for a later date. Defendants, on the other hand, allege they are entitled to summary judgment on both of these claims because they were not required under the terms of the policy to provide the insurance coverage Luxor seeks.

The Court grants Defendants' motion for summary judgment on Luxor's claims for breach of contract and bad faith because Defendants were not required to provide coverage under the insurance policy based on Luxor's claim for coverage as an additional insured. Luxor specifically sought insurance coverage as "an additional insured" for damages it suffered as a

result of the February 2008 accident. (Dkt. #22, Mot. Ex. J.) However, as noted above, Luxor is an additional insured under the insurance policy only when Luxor could be held liable by a third party for Heptagon's negligence—not when Luxor itself requests insurance benefits. Because Luxor is not entitled to this coverage, Defendants did not breach the insurance agreement or act in bad faith when they denied Luxor's property damage claim based on its status as an additional insured. Accordingly, the Court grants Defendants' motion for summary judgment and denies Luxor's motion for summary judgment on these claims.

F. Unfair Claims Practices

Luxor also brings a claim under Nevada's Unfair Claims Practices Statute, NRS § 686A.310. This statute was enacted as "part of a comprehensive plan to regulate insurance practice in Nevada." *Pioneer Chlor Alkali Co. v. Nat'l Union Fire Ins.*, 863 F. Supp. 1237, 1241 (D. Nev 1994). The statute grants insureds and claimants a private right of action against insurance companies that violate this statute. *Id.* In its complaint, Luxor references the language of NRS § 686A.310 and asserts that Defendants are liable for failing to (1) acknowledge and act reasonably promptly upon communications with respect to claims arising under the policy; (2) implement reasonable standards for the prompt investigation and processing of Luxor's claims; (3) affirm or deny coverage of claims within a reasonable time; and (4) promptly provide a reasonable explanation based on the policy for its denial of Luxor's claim.

Specifically, Luxor alleges Defendants violated these provisions when they waited several months to respond to Luxor's claim under the policy and when they failed to state the basis for denying the claim. Defendants argue that they cannot be liable under this statute because the statute on its face applies only to "claims arising under the insurance policies." NRS 686A.310(1)(b). According to Defendants, because Luxor ultimately is not entitled to coverage as an additional insured, its claim does not arise under the insurance agreement and Defendants cannot be liable under this statute.

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The Court grants Luxor's motion and denies Defendants' motion for two reasons. First, the Court is unpersuaded by Defendants' argument that they cannot be liable under NRS 686A.310 in the absence of actual coverage. The plain language of the statute indicates that Defendants' assertion is incorrect. Under § 310(1)(d), an insurer is liable for an unfair claims practice when it fails to "affirm or deny coverage within a reasonable time." In enforcing this statute, the Nevada Insurance Commission has established that insurance companies must inform insureds and claimants within thirty days of their decision regarding the pending insurance claim. NAC 686A.670.2. Thus, an insured or claimant has a cause of action against an insurer if the insurer takes more than thirty days to inform the insured that there is no coverage. *Id.* In addition to this plain language, the fact that the statute provides a private right of action and was enacted as "part of a comprehensive plan to regulate insurance practice in Nevada" supports the conclusion that liability under the statute is not limited by whether or not insurance coverage exists. *Pioneer Chlor Alkali Co.*, 863 F. Supp. at 1241. Finally, the Court notes that in *Pioneer Chlor Alkali v. National Union Fire Insurance* it held that "the provisions of NRS § 686A.310 address the manner in which an insurer handles an insured's claim whether or not the claim is denied." *Id.* at 1243.

Second, the Court grants Luxor's motion because no genuine issue of material fact exists regarding whether Defendants violated NRS 686A.310. Defendants do not dispute that they failed to provide thirty days notice regarding their decision to deny Luxor's claim under the insurance policy. Defendants admit they received notice of Luxor's claim under the insurance policy by August 2008 and that they did not respond to this request for several months. Albert Ramirez, one of the insurance adjustors assigned to this claim, testifies that he sent a cursory letter indicating that Luxor's claim was not covered under the insurance policy in January or February 2009, almost six months after Luxor's original claim under the policy. (Dkt. #23, Mot. Ex. C.) In addition, Robin Singer, a claims director for Defendants, testifies that she was told not to communicate further with Luxor regarding the accident because Luxor was not, in the opinion of Defendants, a claimant or insured under the insurance policy. (Dkt. #23, Mot. Ex. H.) As of the

date of this Order, Defendants still have not provided documentation indicating the specific reason American Insurance denied coverage under the policy. Defendants' failure to give prompt response to Luxor's claim under the insurance policy and its refusal to give a proper explanation for its denial of Luxor's claim are both clear violations of Nevada's Unfair Claims Practices Statute. Accordingly, the Court finds Defendants violated this statute, and it grants Luxor's motion for summary judgment as to liability for this claim. Issues regarding damages under this statute will be determined at a later date.

CONCLUSION

Accordingly, and for good cause appearing,

IT IS HEREBY ORDERED that Defendants Fireman's Fund and American Insurance Company's Motion for Summary Judgment (#22) is GRANTED as to Plaintiff Luxor Hotel & Casino's claims under the Fireman's Fund insurance policy.

IT IS FURTHER ORDERED that Luxor's Motion for Summary Adjudication (#23) is DENIED as to its claims under the Fireman's Fund insurance policy.

IT IS FURTHER ORDERED that Defendants' Motion for Summary Judgment (#22) is GRANTED in part and DENIED in part as to Luxor's claims under the American Insurance policy as follows:

Defendants' Motion is GRANTED as to Luxor's claim for a declaration that it is entitled to insurance coverage as an additional insured for property damage; Luxor's claim for a declaration that it may recover damages as an additional insured for business interruption, extra expenses, covered glass, and damage to foundation; Luxor's claim for breach of contract; and Luxor's claim for bad faith.

Defendants' Motion is DENIED as to Luxor's remaining claims under the American Insurance policy.

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IT IS FURTHERED ORDERED that Luxor's Motion for Summary Adjudication (#23) is GRANTED in part and DENIED in part as it pertains to its claims under the American Insurance policy as follows:

Luxor's Motion is GRANTED as to its claim for a declaration that it is an additional insured under the American Insurance policy; its claim for a declaration that it is entitled to insurance coverage under the "property of others" clause in the policy; and its claim for liability under Nevada's Unfair Claims Practices Statute.

Luxor's Motion is DENIED as to its remaining claims under the American Insurance policy.

Dated: June 7, 2010.

ROGER L. HUNT
Chief United States District Judge

Missouri Court of Appeals

Southern District

Division Two

MERLYN VANDERVORT INVESTMENTS, LLC, AND 7 MILE INVESTMENTS, INC., D/B/A JEREMIAH'S NIGHT CLUB,	)	
Appellants,	)	
v.	)	No. SD29858
ESSEX INSURANCE COMPANY, INC.,	)	Filed: February 11, 2010
Respondent.	)	

APPEAL FROM THE CIRCUIT COURT OF CAMDEN COUNTY
The Honorable Theodore B. Scott, Judge

The issue in this case is whether the trial court correctly granted summary judgment in favor of an insurance company in interpreting a commercial insurance policy. More specifically, the issue is whether an endorsement provided additional coverage for the property loss suffered by Merlyn Vandervort Investments, LLC and 7 Mile Investments, Inc., d/b/a Jeremiah's Night Club (collectively "Insured") in a fire.

This Court finds that Insured is entitled to additional coverage for fire damage as provided in the endorsement. The judgment is reversed and remanded.

Background

Insured owned and operated Jeremiah's Night Club, a bar, restaurant, and entertainment center located in Lake Ozark. A fire destroyed the business, including the building, the business personal property, and the equipment on the premises. The fire investigator stated in his report that he could not identify "an exact cause or ignition source for this fire . . . [a]lthough the electrical wiring is suspect and cannot be eliminated at this time." He also noted in his report that there was wiring in the building that "displayed very heavy arching [sic]."

Prior to the fire, Insured had purchased a commercial insurance policy and endorsement from Essex Insurance Company. The policy provided "building" coverage with a limit of $1.2 million, "business personal property" coverage with a limit of $400,000, and "business income" coverage with a limit of $120,000. The endorsement, entitled "Mechanical, Electrical or Pressure Systems Breakdown," was purchased as optional coverage. The policy declaration described the endorsement as "Equipment Breakdown Coverage with a limit of $1,600,000."

Following the fire, Essex paid Insured $1.2 million under the building coverage, $400,000 under the business personal property coverage, and $120,000 under the business income loss coverage. Insured sought further payment from Essex under the endorsement for the fire damage, asserting that it provided additional coverage with an additional limit of $1.6 million. Essex denied that portion of the claim, stating that fire

damage is covered only in the policy and that the endorsement does not provide any additional coverage for the fire damage suffered. Instead, Essex argued that the endorsement "put back" coverage for certain policy exclusions, including mechanical, electrical, or pressure systems breakdown.

Insured brought a suit seeking damages against Essex for breach of contract and vexatious refusal to pay. Essex filed a motion for summary judgment as to all claims alleged against it, arguing that the endorsement did not provide additional coverage for damage caused by fire loss. Insured filed a cross-motion for partial summary judgment as to the breach of contract claim, arguing the endorsement provided additional coverage and policy limits for damage caused by all "specified causes of loss," including fire. The trial court sustained the Essex's motion for summary judgment and denied Insured's cross-motion for partial summary judgment. Insured appeals.[1]

Standard of Review

Appellate review of summary judgment is de novo. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). Summary judgment is appropriate where the moving party has demonstrated, on the basis of facts as to which there is no genuine dispute, a right to judgment as a matter of law. *Id.* "When the underlying facts are not in question, disputes arising from the interpretation and application of insurance contracts are matters of law for the court." *See Grable v. Atl.*

[1] Insured also claims error in the denial of its motion for partial summary judgment. This is not a final, appealable order, even when the denial occurs at the same time the trial court grants summary judgment to the other party. *Grable v. Atl. Casualty Ins. Co.*, 280 S.W.3d 104, 106 n.1 (Mo. App. 2009).

Casualty Ins. Co., 280 S.W.3d 104, 106 (Mo. App. 2009) (internal quotation marks omitted).

When interpreting the terms of an insurance policy, this Court applies the meaning that would be understood by an ordinary person of average understanding purchasing the insurance. *Seeck v. Geico Gen. Ins. Co.*, 212 S.W.3d 129, 132 (Mo. banc 2007). If the policy is ambiguous, it will be construed against the insurer. *Id.* A policy is ambiguous if "there is duplicity, indistinctness, or uncertainty in the meaning of the language in the policy." *Id.* If the policy is unambiguous, the policy will be enforced according to its terms. *Id.*

Interpretation of the Policy

The issue in this case is whether the endorsement, regardless of its limits, provides additional coverage beyond that provided by the policy in its unendorsed form for loss suffered by Insured in a fire.[2] Insured claims that the policy was ambiguous, requiring this Court to construe it against Essex. Alternatively, Insured contends that the endorsement unambiguously provided additional coverage for all causes of loss, including fire. Both arguments require this Court to interpret the insurance contract, which includes the form policy, declarations, endorsements, and definitions, and determine, as a matter of law, what coverage the policy provides. *See Grable*, 280 S.W.3d at 107-108.

[2] This Court does not address Insured's arguments that if the endorsement applies to fire damage, it provides coverage limits above and beyond the stated unendorsed policy limits. This issue was not included in Essex's motion for summary judgment.

The unendorsed policy was comprised of several forms. First, the Building and Personal Property Coverage form provided, in relevant part:

> [Essex] will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.
> . . . .
>
> 3. Covered Causes Of Loss
> See applicable Causes of Loss Form as shown in the Declarations.

Next, the Causes of Loss – Special Form CP 1030 ("Loss form") defined "covered causes of loss" as:

> When Special is shown in the Declarations, Covered Causes of Loss means RISKS OF DIRECT PHYSICAL LOSS unless the loss is:
> 1. Excluded in Section B., Exclusions; or
> 2. Limited in Section C., Limitations; that follow.

The relevant exclusion listed in Section B. stated:

> 2. [Essex] will not pay for loss or damage caused by or resulting from any of the following:
>
> a. Artificially generated electrical current, including electrical arcing, that disturbs electrical devices, appliances or wires.
> But if artificially generated electrical current results in fire, we will pay for the loss or damage caused by that fire.

Further, the Loss form defined "specified causes of loss"[3] in Section F. as:

> *Fire*; lightning; explosion, windstorm or hail; smoke; aircraft or vehicles; riot or civil commotion; vandalism; leakage from fire extinguishing equipment; sinkhole collapse; volcanic action; falling objects; weight of snow, ice or sleet; water damage.

(emphasis added).

[3] The dissent posits an interpretation of "specified causes of loss" that is neither discussed by the parties nor apparent from a logical interpretation of the policy.

Both parties agree that the unendorsed policy provided coverage for damage due to the peril of fire. In fact, Essex paid Insured $1.6 million pursuant to the unendorsed policy for property damage. It is also uncontested that the unendorsed policy excluded coverage for damage as a result of artificially generated electrical current, including electrical arcing, that disturbs electrical devices, appliances, or wires, and mechanical breakdown.[4] And although electrical or mechanical breakdown was excluded in the unendorsed policy, the parties agree that the endorsement expands the scope of covered perils, defined as "specified causes of loss" to include "direct damage to covered property" from electrical and mechanical breakdown. The endorsement provided, in relevant part:

> THIS ENDORSEMENT CHANGES THE POLICY
> . . . .
>
> This endorsement modifies and is subject to the insurance provided under the following:
> BUILDING AND PERSONAL PROPERTY COVERAGE FORM
> . . . .
> CAUSES OF LOSS – SPECIAL FORM
> . . . .
>
> 6. As respect the [Loss form] the following applies:
> a. The following EXCLUSIONS are deleted;
> The exclusions pertaining to:
> (1) Artificially generated electrical current, including electrical arcing, that disturbs electrical devices, appliances or wires.
> (2) Mechanical breakdown, including rupture or bursting caused by centrifugal force.

[4] There is no dispute that if the excluded artificially generated electrical current results in fire, Essex will pay for the loss of damage caused by that fire.

The crux of the dispute, however, is whether the endorsement provided additional coverage for fire. The relevant provision of the endorsement that is in dispute states as follows:

> 4. As respects to the [Loss form] the following applies:
>
> a. The following Definition, "Specified Causes of Loss," is deleted and replaced by the following:
>
> "Specified Causes of Loss" means the following: *Fire*; lightning; explosion; windstorm or hail; smoke; aircraft or vehicles; riot or civil commotion; vandalism; leakage from fire extinguishing equipment; falling objects; weight of snow, ice or sleet; water damage; mechanical, electrical or pressure systems breakdown;
>
> . . . .
>
> (3) Mechanical, electrical or pressure systems breakdown means direct damage to covered property from the following:
>
> (a) Mechanical breakdown, including rupture or bursting caused by centrifugal force;
>
> (b) Artificially generated electrical current, including electrical arcing, that disturbs electrical devices, appliances or wires;

(emphasis added).

Insured asserts that the endorsement provided additional coverage for fire in that the definition of "specified causes of loss" in the endorsement included the word "fire," as did the definition of "specified causes of loss" in the unendorsed policy. Yet Essex argues that an ordinary person of average understanding purchasing the policy would believe that the endorsement did not provide additional fire coverage because it was already covered in the unendorsed policy. Essex claims that because the endorsement's "specified causes of loss" added six words, "mechanical, electrical or pressure systems breakdown," it was the only peril that was covered. It asserts that the endorsement only "put back" the cause that was specifically excluded in the unendorsed policy.

To determine whether an ambiguity exists, this Court reads the form policy, declarations, endorsement, and definitions. *See Grable*, 280 S.W.3d at 107-08. "If the language of the endorsement and the general provisions of the policy conflict, the endorsement will prevail, and the policy remains in effect as altered by the endorsement." *Abco Tank & Mfg. Co. v. Fed. Ins. Co.*, 550 S.W.2d 193, 198 (Mo. banc 1977).

We find no ambiguity in the endorsement's definition of "specified causes of loss." Despite Essex's argument that the endorsement did not provide any additional coverage for the peril of fire, the plain reading of the endorsement listed "fire" as one of the "specified causes of loss":

> "Specified Causes of Loss" means the following: *Fire*; lightning; explosion; windstorm or hail; smoke; aircraft or vehicles; riot or civil commotion; vandalism; leakage from fire extinguishing equipment; falling objects; weight of snow, ice or sleet; water damage; mechanical, electrical or pressure systems breakdown . . . .

(emphasis added). While the endorsement's definition of "specified causes of loss" did add coverage for "mechanical, electrical or pressure systems breakdown," the balance of the itemized causes of loss was nearly identical to those enumerated in the unendorsed policy.[5] Nothing in the endorsement indicated that any of the identical "specified causes of loss" were to be excluded from the endorsement's coverage because they were already covered in the policy. An ordinary person of average understanding could reasonably construe that since "fire" was listed in both the policy and the endorsement, there was

[5] The policy provides that "specified causes of loss" include "sinkhole collapse [and] volcanic action" while the endorsement's definition of "specified causes of loss" omits those perils.

additional coverage.[6] Accordingly, this Court finds that, as a matter of law, the endorsement provided additional coverage for fire damage.[7]

The grant of summary judgment is reversed and remanded.

_____
Mary R. Russell, Special Judge

Scott, C.J., dissents in separate opinion
Rahmeyer, J., concurs

Filed: February 11, 2010
Appellants' attorney: Ben T. Schmitt, Lesley Renfro Willson
Respondent's attorney: Thomas B. Caswell, Lindsey A. Davis, Colly J. Durley

[6] The dissent falsely predicts that the majority's opinion endangers future interpretations of contracts. However, this opinion is limited to the unique language of this policy.

[7] Insured's arguments regarding extrinsic evidence are not addressed as this Court finds no ambiguity. *Black & Veatch Corp. v. Wellington Syndicate*, ___ S.W.3d ___ (Mo. App. 2009), 2009 WL 3425362 (No. WD69286, decided Oct. 27, 2009).

Missouri Court of Appeals

Southern District

Division Two

MERLYN VANDERVORT INVESTMENTS, LLC, and 7 MILE INVESTMENTS, INC., d/b/a JEREMIAH'S NIGHT CLUB,	)	
Appellants,	)	No. SD29858
vs.	)	
ESSEX INSURANCE COMPANY, INC.,	)	Filed: February 11, 2010
Respondent.	)	

DISSENTING OPINION

I respectfully dissent. The court finds the "Mechanical, Electrical or Pressure Systems Breakdown" endorsement does not merely add such coverage; it also boosts the policy limits for fire, windstorm, hail, and every other insured risk. By analogy, my basic $100,000 homeowner's policy pays nothing if a power surge ruins my TV and computers. Under the principal opinion, if I insure those via the endorsement in this case, I luck into doubling my other policy limits as well.[1]

[1] Although Appellants claim they meant to increase their coverage, subjective intent is irrelevant under the principal opinion, which finds additional coverage from the policy's four corners as a matter of law.

I have several concerns. First, Appellants' fire coverage did not stem from the "specified causes of loss" definition, but from the policy's obligation to "pay for direct physical loss ... caused by or resulting from any Covered Cause of Loss,"[2] the latter being risks not excluded or limited by the policy.[3] "Specified causes of loss," by contrast, are *exceptions* to the policy's exclusions – none applicable here – for damage due to rust, fungus, smog, bird nesting, etc.[4] The principal opinion misses the critical distinction between "covered" and "specified" causes of loss.

Second, and more broadly, I think the principal opinion endangers an oft-used and reasonable method of revising contracts and complex writings. Our legislature, for example, can amend a statute by passing a bill that adds a word to the end of one line, removes a clause and punctuation from the next, and makes other line-by-line changes to the existing text. Commonly, however, legislative bills delete and replace entire statutory sections with new sections incorporating all the changes, a process that presumably reduces the risk of error.

As this case illustrates, insurers use the same process to amend policies by endorsement. I think the principal opinion unwittingly punishes this by potentially doubling the insurer's exposure solely, in that opinion's words, because:

> Nothing in the endorsement indicated that any of the identical specified causes of loss were to be excluded from the endorsement's coverage because they were already covered in the policy. An ordinary person of average understanding could reasonably

[2] Building and Personal Property Coverage Form, Section A., titled "COVERAGE."
[3] Causes of Loss – Special Form, Section A., titled "COVERED CAUSES OF LOSS."
[4] Causes of Loss – Special Form, Section B.2 ("But if an excluded cause of loss that is listed in 2.d. (1) through (7) results in a 'specified cause of loss' ... we will pay for the loss or damage caused by that 'specified cause of loss.'"). Exclusions 2.d. (1) through (7), as noted above, include losses caused by rust, fungus, smog, bird nesting, etc.

> construe that *since "fire" was listed in both the policy and the endorsement, there was additional coverage*. [my emphasis]

Again, "specified causes of loss" are contractually irrelevant to this case. But even if they applied, the endorsement expressly says its list of "specified losses" *deletes and replaces* the base policy's list.[5] For all these reasons, I believe no reasonable policyholder would think this endorsement did other than its title and language in context suggest.

In summary, the principal opinion hinges on a policy definition inapplicable to this loss. It also, in my opinion, adds risk to a common and legitimate way of amendment, and may subject many policies and endorsements to similar attacks. I have found no cases with comparable results or reasoning. I do not think we should be among the first to so hold.

DANIEL E. SCOTT, Chief Judge

[5] Consider the principal opinion's analysis on a comparable attempt to *narrow* a policy's scope. Assume an endorsement that "deleted and replaced" this base policy's covered losses with an otherwise identical list omitting "hail." By still treating the original list as part of the policy, and not "deleted" as the endorsement requires, hail still may be covered and all else double-covered.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
March 15, 2010

Charles R. Fulbruge III
Clerk

No. 09-60209

CATLIN SYNDICATE LIMITED,

Plaintiff–Appellee

v.

IMPERIAL PALACE OF MISSISSIPPI, INC; IMPERIAL PALACE OF MISSISSIPPI, LLC,

Defendants–Appellants

Appeal from the United States District Court
for the Southern District of Mississippi
No. 1:08-CV-97

Before JONES, Chief Judge, and BENAVIDES and PRADO, Circuit Judges.

PRADO, Circuit Judge:

Insurer Catlin Syndicate and casino operator Imperial Palace disagree about how to determine loss under the business-interruption provision of the insurance policy that Catlin issued to Imperial Palace. Catlin argues that the business-interruption provision unambiguously indicates that only historical sales figures should be considered when determining loss. Imperial Palace argues that the provision is ambiguous, and therefore sales figures after reopening should also be taken into account.[1]

[1] This issue has caused debate among courts and commentators. *See, e.g.*, H. Richard Chattman & Gregory D. Miller, *Measuring Business Interruption Loss in Wide-Impact*

We addressed the definition of "loss" under a materially identical business-interruption provision in *Finger Furniture Co. v. Commonwealth Insurance Co.*, 404 F.3d 312 (5th Cir. 2005). *Finger Furniture* does not control this case because it dealt with a question of Texas law, while this case deals with a question of Mississippi law. However, there is no significant difference between Texas and Mississippi law on this issue. Accordingly, we find that Mississippi courts would apply the law in the same way as Texas courts, and we AFFIRM.

I.

Hurricane Katrina damaged Imperial Palace, forcing it to shut down for several months. When Imperial Palace reopened, its revenues were much greater than before the hurricane; many nearby casinos remained closed, and people who wanted to gamble had few choices. Imperial Palace submitted a claim to its insurers, including Catlin. Catlin agreed to pay the claim, but the parties disputed Imperial Palace's losses. Imperial Palace stated that its losses were approximately $165 million, while Catlin believed the losses were closer to $65 million. The largest discrepancy was in the amount of business-interruption loss: Imperial Palace put this amount at about $80 million, while Catlin put it at about $6.5 million. This discrepancy resulted from the parties' different interpretations of the policy's business-interruption provision, which states, in pertinent part:

> Experience of the business – In determining the amount of the Time Element loss as insured against by this policy, due consideration shall be given to experience of the business before the loss and the probable experience thereafter had no loss occurred.

Catlin filed a complaint in federal district court, seeking declaratory relief. Imperial Palace counterclaimed for breach of contract and negligence, among other claims. The parties filed cross-motions for summary judgment. Catlin

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Catastrophes: Insurance Against Catastrophes or Only Against Insured Damage from Catastrophes?, 19 COVERAGE 1 (Jul./Aug. 2009).

argued that under the business-interruption provision, Imperial Palace's recovery should be based on net profits Imperial Palace would probably have earned if Hurricane Katrina had not struck the Mississippi Gulf Coast and damaged its facilities. Thus, Catlin stated that Imperial Palace's loss should be determined by looking solely at pre-hurricane sales. Imperial Palace argued that the correct hypothetical was not one in which Hurricane Katrina did not strike at all; it was one in which Hurricane Katrina struck but did not damage Imperial Palace's facilities. Accordingly, Imperial Palace averred that its recovery should be based in part on the amount it actually earned when it reopened after Katrina.

After considering the parties' arguments, the district court denied Imperial Palace's motion in its entirety, and granted Catlin's motion "to the extent that Catlin [sought] a partial summary judgment that [Imperial Palace's] profits upon reopening after Hurricane Katrina should not be taken into account to determine what [Imperial Palace] would have experienced had the storm not occurred." *Catlin Syndicate Ltd. v. Imperial Palace of Miss., Inc.*, No. 1:08-CV-97, 2008 WL 5235888, at *1, *8 (S.D. Miss. Dec. 15, 2008). We granted leave to appeal the district court's interlocutory order solely as to this ruling.

II.

The district court has diversity jurisdiction over this case under 28 U.S.C. § 1332. We have jurisdiction over Imperial Palace's interlocutory appeal under 28 U.S.C. § 1292(b).

We review the "legal determinations in a district court's decision to grant summary judgment *de novo*, applying the same legal standards as the district court to determine whether summary judgment was appropriate." *Gonzalez v. Denning*, 394 F.3d 388, 391 (5th Cir. 2004) (citations omitted). "Summary judgment is proper where, after viewing the evidence in the light most favorable to the nonmovant, the record indicates that no genuine issue of material fact

exists." *Finger Furniture*, 404 F.3d at 313 (citing *Denning*, 394 F.3d at 391). Interpretation of a contract is a purely legal matter; therefore, we review the district court's construction of Imperial Palace's policy *de novo*. *See id.* (citing *Sentry Ins. v. R.J. Weber Co.*, 2 F.3d 554, 556 (5th Cir. 1993)). Because this is a diversity case involving a Mississippi contract, we apply Mississippi contract law to interpret the policy. *See Ideal Mut. Ins. Co. v. Last Days Evangelical Ass'n*, 783 F.2d 1234, 1240 (5th Cir. 1986) (stating that a federal court applies the substantive law of the forum state in a diversity action). Under Mississippi law, if a policy is worded so that it can be given only one reasonable construction, a court must enforce the policy as written. *See U.S. Fid. & Guar. Co. of Miss. v. Martin*, 998 So. 2d 956, 963 (Miss. 2008).

III.

In *Finger Furniture*, a tropical storm caused Finger's stores to close for one to two days. 404 F.3d at 313. A week after reopening, Finger slashed prices, and sales soared. *Id.* Finger filed a claim for lost sales under the business-interruption provision of its insurance contract with Commonwealth. *Id.* The business-interruption provision stated, in pertinent part:

> In determining the amount of gross earnings covered hereunder for the purposes of ascertaining the amount of loss sustained, due consideration shall be given to the experience of the business before the date of the damage or destruction and to the probable experience thereafter had no loss occurred.

Id. at 314.

Commonwealth denied the claim, arguing that Finger's increased sales the following week made up for the sales that it did not make while closed. *Id.* at 314. Commonwealth filed a declaratory judgment action. *Id.* at 313. The district court granted Finger's motion for summary judgment, and Commonwealth appealed. *Id.*

In affirming, we explained that the proper method for determining loss under the business-interruption provision was to look at sales before the interruption rather than sales after the interruption. *Id.* at 314. We noted that "the policy requires due consideration of the business's experience before the date of the loss and the business's probable experience had the loss not occurred," and that this language should be interpreted as meaning "that a business-interruption loss will be based on historical sales figures." *Id.* We stated that "[h]istorical sales figures reflect a business's experience before the date of the damage or destruction and predict a company's probable experience had the loss not occurred," and that "[t]he strongest and most reliable evidence of what a business would have done had the catastrophe not occurred is what it had been doing in the period just before the interruption." *Id.*

We declined to consider post-interruption sales, noting that "the business-loss provision says nothing about taking into account actual post-damage sales to determine what the insured would have experienced had the storm not occurred." *Id.* Further, we stated that "[t]he contract language does not suggest that the insurer can look prospectively to what occurred after the loss to determine whether its insured incurred a business-interruption loss." *Id.*

The language in the business-interruption provision of Imperial Palace's insurance policy with Catlin mirrors the language in *Finger Furniture*, with one minor distinction. In *Finger Furniture*, the provision said, "In determining the amount of . . . loss . . . , due consideration shall be given to the experience of the business before the . . . *damage or destruction* and to the probable experience thereafter had no loss occurred." Here, the provision says, "In determining the amount of the . . . loss . . . , due consideration shall be given to experience of the business before the *loss* and the probable experience thereafter had no loss occurred." Imperial Palace urges us to distinguish *Finger Furniture* on this

basis. But this is a distinction without a difference; in the context of these business-interruption provisions, the terms "damage or destruction" and "loss" are functionally equivalent.[2] Indeed, in common usage "damage" and "destruction" are two definitions of "loss." RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 1137 (2d ed. 2001). Likewise, "loss" is a synonym for "damage." *Id.* at 504.

In addition, Imperial Palace tries to distinguish *Finger Furniture* on its facts. In *Finger Furniture*, the insurer argued that post-storm sales should be taken into account to show that the insured did not actually incur any losses. Here, the insured—not the insurer—argues that post-hurricane sales should be taken into account to show that losses were much greater than pre-hurricane figures would indicate. But our determination in *Finger Furniture*, like our determination here, was based on a legal analysis of the business-interruption provision and did not depend on the facts that Imperial Palace highlights. The language in the two provisions is materially identical, so the analysis is the same despite the factual dissimilarities.

Imperial Palace also argues that *Finger Furniture* is distinguishable because a "favorable conditions clause" might have existed in that case, but none exists in the instant case. A favorable conditions clause prohibits consideration of post-loss business increases when determining the amount of business-interruption losses. If a favorable conditions clause existed in *Finger Furniture*, it did not impact the analysis. Accordingly, it is not a valid basis on which to distinguish *Finger Furniture* from the instant case.

Finally, Imperial Palace argues that Catlin's interpretation of the business-interruption provision conflates the term "loss" with the idea of an

[2] Imperial Palace also argues that in *Finger Furniture* we used loss as a descriptive term and did not intend to equate it with damage or destruction. Nowhere in *Finger Furniture* do we find support for this argument.

"occurrence." In this case, Hurricane Katrina was the "occurrence", which inflicted "losses" on many victims, one of which was Imperial Palace. Imperial Palace asserts that Catlin asks us to interpret the business-interruption provision in such a way that the phrase "had no loss occurred" morphs into "had no occurrence occurred." Imperial Palace argues that instead, we should disentangle the loss from the occurrence and determine loss based on a hypothetical in which Hurricane Katrina hit Mississippi, damaged all of Imperial Palace's competitors, but left Imperial Palace intact: the occurrence occurred, but the loss did not. While we agree with Imperial Palace that the loss is distinct from the occurrence—at least in theory—we also believe that the two are inextricably intertwined under the language of the business-interruption provision. Without language in the policy instructing us to do so, we decline to interpret the business-interruption provision in such a way that the loss caused by Hurricane Katrina can be distinguished from the occurrence of Hurricane Katrina itself.[3]

[3] Courts interpreting similar business-interruption provisions have generally reached the same conclusion. *See*, *e.g.*, *Finger Furniture*, 404 F.3d at 314 ("[T]he business-loss provision says nothing about taking into account actual post-damage sales to determine what the insured would have experienced had the storm not occurred."); *Prudential LMI Commercial Ins. Co. v. Colleton Enters., Inc.*, No. 91-1757, 1992 WL 252507, at *4 (4th Cir. Oct. 5, 1992) ("[A]n insured under a business interruption provision such as that here in issue may not claim as a probable source of expected earnings . . . a source that would not itself have come into being but for the interrupting peril's occurrence."); *Am. Auto. Ins. Co. v. Fisherman's Paradise Boats, Inc.*, No. 93-2349, 1994 WL 1720238, at *4 (S.D. Fla. Oct. 3, 1994) ("[H]ad no hurricane occurred (the policy's built in premise for assessing profit expectancies during business interruption), [then] neither would the claimed earnings source.") (quotation omitted). *But see Colleton Enters., Inc.*, 1992 WL 252507, at *4 (Hall, J., dissenting) ("'Had no loss occurred' does not refer to the overall loss in the surrounding area; rather, it clearly refers only to the loss incurred by the insured."); *Stamen v. Cigna Prop. & Cas. Ins. Co.*, No. 93-1005, slip op. at 6 (S.D. Fla. June 10, 1994) (order granting summary judgment) ("If Cigna had meant to preclude consideration of Food Spot's post-hurricane profits in the lost profits calculation, it should have substituted the word 'occurrence' for the word 'loss' in the clause describing how business interruption losses would be calculated.").

Because "loss" and "damage or destruction" are equivalent terms, the business-interruption provision in *Finger Furniture* is materially identical to the provision in this case, and our interpretation of the provision in *Finger Furniture* guides us now. *Finger Furniture* tells us "that a business-interruption loss will be based on historical sales figures," and that we should not "look prospectively to what occurred after the loss." 404 F.3d at 314. Thus, in the business-interruption provision at hand, only historical sales figures should be considered when determining loss, and sales figures after reopening should not be taken into account.

Finger Furniture does not control this case because it dealt with a question of Texas law, while this case deals with a question of Mississippi law. However, there is no material difference between Texas and Mississippi law on this issue. *Compare Puckett v. U.S. Fire Ins. Co.*, 678 S.W.2d 936, 938 (Tex. 1984) ("When there is no ambiguity [in an insurance contract], it is the court's duty to give the words used their plain meaning."), *with Martin*, 998 So. 2d at 963 ("[I]f [an insurance policy] is clear and unambiguous, then it must be interpreted as written."). Accordingly, we find that Mississippi courts would apply the law in the same way as Texas courts.

IV.

We AFFIRM.

Back

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
VALDOSTA DIVISION

B.S.S.B., INC.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**Civil Action No.**
	:	**7:08-CV-112 (HL)**
OWNERS INSURANCE COMPANY,	:	
	:	
Defendant.	:	
	:	
	:	
_____	:	

ORDER

Before the Court is Defendant Owners Insurance Company's ("Owners") Motion for Summary Judgment (Doc. 16) and Motion to Exclude John Huggins as an Expert Witness (Doc. 15). For the following reasons, Owners' Motion for Summary Judgment is granted and Owners' Motion to Exclude John Huggins as an Expert Witness is denied as moot.

I. COMPLIANCE WITH LOCAL RULE 56

Plaintiff, B.S.S.B., Inc. ("B.S.S.B."), failed to comply with its obligations under this District's Local Rules when it filed its response to Owners' Motion for Summary Judgment. Local Rule 56 requires that a party responding to a motion for summary judgment include a "separate and concise statement of material facts." The party must respond "to each of the movant's numbered material facts." Otherwise, "[a]ll

material facts contained in the moving party's statement which are not specifically controverted in respondent's statement shall be deemed to have been admitted, unless otherwise inappropriate."

B.S.S.B.'s statement of material facts is a statement of the issues, rather than the facts, it argues are genuine. The statement does not respond to each of the Owners' numbered material facts. Thus, the Court could deem the facts in Owners' statement admitted. Nevertheless, requiring B.S.S.B. to re-submit its statement of material facts would delay the disposition of the summary judgment motion, and the Court can review the relatively small record to determine whether there are genuine issues of material fact. Accordingly, the Court will not penalize B.S.S.B. for failing to comply with Local Rule 56. The facts in Owners' statement of material facts are not admitted.

II. FACTUAL AND PROCEDURAL BACKGROUND[1]

Owners issued B.S.S.B. an insurance policy ("policy") on July 11, 2006. (Def. Ex. A Part 1). The policy provided property coverage to B.S.S.B. for a hotel it owned called the Relax Inn. (Def. Ex. A Part 1). The hotel was located at 4145 Barneyville Road, Sparks, Georgia. (Def. Ex. A Part 1). The policy's term of coverage was from August 4, 2006 to August 4, 2007. (Def. Ex. A Part 1).

On July 14, 2007, while the policy was in effect, B.S.S.B.'s hotel was damaged

[1] The Court views the facts in the light most favorable to B.S.S.B.

by a wind and rain storm. (Dipakkumar Ghodiwala Aff. at 2). B.S.S.B.'s owner, Dipakkumar Ghodiwala, notified Owners of the damage to the hotel. (Dipakkumar Ghodiwala Aff. at 2).

B.S.S.B. hired John Huggins ("Huggins"), a public adjuster, to determine the amount of damage the storm caused to the hotel and its operations. (Huggins Dep. at 33-36). On August 29, 2007, Huggins submitted a proof of loss to Owners. (Pl. Ex. 3). According to Huggins' calculations, the cost to replace the damaged parts of the hotel totaled $85,127.85. (Pl. Ex. 3). He testified that repairs to the property could be completed in three months. (Huggins Dep. at 58).

Also on August 29, 2007, Mark Smith ("Smith"), Owners' field claim representative, wrote Huggins explaining that according to Owners' investigation, the only covered damage determined to exist at that time was in the hotel's lobby and restaurant. (Pl. Ex. 4). For this damage, the total amount owed to B.S.S.B. was $19,679.09, but B.S.S.B.'s deductible payment would reduce Owners' obligation to $17,179.09. (Pl. Ex. 4). The letter also explained that Owners was only obligated to pay the actual cash value of the property loss, totaling $9,336.99, until the damages were actually repaired. (Pl. Ex. 4).

On September 5, 2007, Owners issued B.S.S.B. an initial check for $9,366.99 in payment for the actual cash value of the damaged property found in the hotel's lobby restaurant. (Pl. Ex. 4 and 6). On that same day, Huggins submitted another proof of loss to Owners claiming $222,873.31 for the damaged property in the hotel.

(Pl. Ex. 5).

On September 10, 2007, Huggins wrote Smith asking that Owners pay B.S.S.B. for losses pursuant to the policy's loss of business income provision. According to Huggins, the hotel had generated no income since July 14, 2007. (Pl. Ex. 7). He believed that B.S.S.B. was entitled to recover $315,330.10 for twelve months of lost revenue. (Pl. Ex. 8).

Smith responded to Huggins' request for lost business income. He stated that based on his investigation of the hotel's premises, the hotel was still in operation and it could rent out its rooms to guests. (Pl. Ex. 9). Therefore, B.S.S.B. was not entitled to recover any payment for lost income caused by the storm. (Pl. Ex. 9). Smith added, however, that Owners would consider a claim for loss of business income if B.S.S.B. submitted supporting documentation "that warrants [the claim] to be paid." (Pl. Ex. 9).

B.S.S.B. was dissatisfied with Owners' initial refusal to pay its loss of business income claim and with Owners' decision to initially pay $17,179.09 for the property damage claim. The reason for B.S.S.B.'s dissatisfaction was that it was concerned about losing its hotel to foreclosure. (Pl. Ex. 10). According to B.S.S.B., if Owners promptly paid its loss of business income claim and paid more for the property damage claim, then foreclosure would be unlikely because repairs to the property

could be made and business would increase.[2] (Pl. Ex. 10).

In attempt to resolve the dispute surrounding the value of its claims, B.S.S.B. made a settlement offer to Owners on November 7, 2007 for $603,862.45. (Pl. Ex. 10). B.S.S.B. threatened litigation if Owners refused to accept the offer or pay the requested amount for B.S.S.B.'s claims. (Pl. Ex. 10). Owners did not agree to the settlement offer.

Owners did not pay B.S.S.B. any additional money under the policy until March 10, 2008. (Pl. Ex. 19 and 20). By then, B.S.S.B. had completed voluntary Chapter Thirteen bankruptcy proceedings. As part of the bankruptcy settlement, N. Krupa Corporation, a B.S.S.B. creditor, took title to the hotel property. (Pl. Ex. 24). As a result, Owners' March 10, 2008 payment of $59,924.80 for B.S.S.B.'s property damage claim went to N. Krupa Corporation. (Dipakkumar Ghodiwala Dep. at 13).

Owners March 10, 2008 payment included $37,085.25 to cover B.S.S.B.'s loss of business income claim.[3] (Pl. Exhibit 19, 20, and 26). B.S.S.B. received this payment. To determine the amount of lost income Owners hired Neal Cason ("Cason"), a certified public accountant. (Def. Ex. G). Cason reviewed the hotel's income, sales, and use tax returns, its monthly financial statements for 2006 and 2007, as well as the hotel's yearly financial statements for 2005 through 2007. (Def.

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[2] B.S.S.B. lost $36,641.07 in 2005 (Def. Ex. J) and in 2006, had a profit of $5,138.29 (Def. Ex. I).

[3] Owners did not adopt Smith's initial determination that B.S.S.B. did not have a loss of business income claim.

Ex. G). From these documents, Cason concluded that the hotel's loss of business income for five months of diminished occupancy totaled $37,085.25. (Def. Ex. H).

On July 11, 2008, B.S.S.B. filed a complaint against Owners in the Superior Court of Cook County, Georgia, seeking additional payment under the policy for loss of business income and extra expenses.[4] It also made bad faith, consequential damages, and reasonable attorney's fees claims. On August 15, 2008, Owners removed the case to this Court pursuant to 28 U.S.C. § 1441. Owners filed its Motion for Summary Judgment on April 28, 2009, seeking judgment as a matter of law on all of B.S.S.B.'s claims. Filed contemporaneously with its Motion for Summary Judgment, is Owners' Motion to Exclude the Expert Testimony of Huggins.

III. DISCUSSION

A. Summary Judgment Standard

Summary judgment must be granted if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material facts and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In ruling on a defendant's motion for summary judgment, the court takes the facts in the light most favorable to the plaintiff. Stanley v. City of Dalton, 219 F.3d 1280, 1287 (11th Cir. 2000). The court may not, however, make

[4] B.S.S.B. does not have title to the hotel property; thus, any claim for additional payment for the hotel's property damage lies with N. Kupta Corporation.

credibility determinations or weigh the evidence. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986).

The initial burden lies on the movant to demonstrate that the nonmovant lacks evidence to support an essential element of its claim. Lowe v. Aldridge, 958 F.2d 1565, 1569 (11th Cir. 1992). The movant must identify "those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (internal quotation marks omitted).

If the moving party meets his burden, then the burden shifts to the nonmovant, who must come forward with some evidence that would allow a jury to find in his favor, even if the parties dispute that evidence. Lowe, 958 F.2d at 1569. If the evidence that the nonmovant presents, however, is "not significantly probative" or "merely colorable," then summary judgment may be granted. Liberty Lobby, 477 U.S. at 249.

B. Breach of Contract

B.S.S.B. asserts that Owners breached the terms of the policy because B.S.S.B. was owed more in damages for extra expenses and loss of business income than the $37,085.25 that Owners paid.

1. Damages for Extra Expenses

The policy provides that Owners will pay extra expense. Extra expense is

defined in the policy as "necessary expenses [the insured] incur[s] during the 'period of restoration' that [the insured] would not have incurred if there had been no direct loss or damage to property caused by or resulting from a Covered Cause of Loss."

In support of its position that it is owed money under the extra expense provision, B.S.S.B. refers the Court to Mr. Ghodiwala's affidavit, which states that Mr. Ghodiwala was never paid $1,500.00 for the repairs he made to the hotel's roof and was never paid $500.00 for the water cleaning. Owners contends that B.S.S.B. never requested payment for extra expenses until it did so in its response brief. Because there is no evidence that B.S.S.B. made a timely claim for extra expenses, Owners asserts B.S.S.B. cannot defeat summary judgment on the extra expense claim.

The Court agrees with Owners. To have a claim for extra expense, B.S.S.B. must have demanded payment from Owners for the costs of cleaning the water and repairing the room. B.S.S.B. has not presented the Court with any evidence showing that before this case commenced, or during discovery, it asked Owners to reimburse it for the expenses it incurred in repairing the roof and cleaning the water. On this basis alone, the Court could conclude that B.S.S.B. has not carried its summary judgment burden. See Hammer v. Slater, 20 F.3d 1137, 1141 (11th Cir. 1994) (stating that "the non-moving party must either point to evidence in the record or present additional evidence sufficient to withstand a directed verdict motion at trial based on the alleged evidentiary deficiency.").

The Court has also independently reviewed the record to determine whether there is evidence that B.S.S.B. made a claim for these extra expenses prior to filing its reply brief. Finding no such evidence, the Court concludes that B.S.S.B. has not created a genuine issue of fact as to whether it is entitled to damages for extra expenses.

2. Damages for Loss of Business Income

The policy provides that Owners will pay for the actual loss of business income an insured sustains "due to the necessary suspension of [its] 'operations' during the 'period of restoration.'" Business income is defined as the "Net Income (Net Profit or Loss before income taxes) that would have been earned or occurred." Owners will not pay for loss of business income once "[the insured] could restore [its] 'operations' with reasonable speed, to the condition that would have existed if no direct physical loss or damage occurred." Reading these provisions together, the policy covers lost profits incurred by the insured until repairs to the insured property could reasonably be made.

Owners paid B.S.S.B. $37,085.25 for the loss of business income B.S.S.B. incurred due to the storm's damage. Owners determined that B.S.S.B. lost $37,085.25 in profits during the five months following the storm.

B.S.S.B. first argues that this amount is insufficient because it could not reasonably restore its operations within five months. According to B.S.S.B., it was entitled to receive loss of business income payments from Owners at least until

March 10, 2008, the date that Owners paid the property damage claim. Without payments from Owners, B.S.S.B. could not complete the repairs. In response, Owners argues that B.S.S.B. admitted it could reasonably complete repairs within three months time and that Owners generously awarded B.S.S.B. an additional two months of compensation for lost business income.

Although not briefed by the parties, the initial issue before the Court is whether the policy establishes that loss of business income coverage extends until the date the insured can afford to pay for the repairs or until the date that Owners pays the insured's property damage claim. According to the policy, coverage ends on the date that the insured "could" restore its operations. It does not provide coverage until the date that the insured "does" restore its operations. The Court finds that the use of the word "could" means that coverage exists for the period of time the repairs, if they were made, would reasonably take to complete. This conclusion is supported by common sense. If Owners was required to provide loss of business income coverage until insureds could afford repairs or until it made payment on a property claim, then insureds would have the incentive to delay settling their property damage claims. Coverage under the loss of business income provision would also be inequitable because the amount paid under the policy would differ depending on whether the insured had the financial means to make the repairs. For these reasons, the Court concludes that the policy clearly establishes that loss of business income coverage lasts until repairs could reasonably be made, regardless of

whether the insured can afford to pay for the repairs and irrespective of the date that Owners pays for the property damage.

In this case, Huggins admitted that the repairs to the hotel could be completed within three months. Based on this admission, B.S.S.B. is entitled to three months of lost business income. B.S.S.B. may survive summary judgment on its loss of income claim if it presents evidence that it is owed more than $37,085.25 for three months of lost profits.

Under Georgia law, "to recover lost profits one must show the probable gain with great specificity as well as expenses incurred in realizing such profits. In short, the gross amount minus expenses equals the amount of recovery."[5] Grossberg v. Judson Gilmore Assoc., Inc., 196 Ga. App. 107, 108-09 (Ga. Ct. App. 1990) (citation omitted). To establish "probable gain with great specificity" the business must have a sufficient operations history. The history must sufficiently show the business' revenues over time and the cost of doing business. Champion v. Dodson, 587 S.E.2d 402, 406 n. 3 (Ga. Ct. App. 2003). If such revenue and costs can be shown with reasonable certainty, then the lost profits can be determined from historic revenue levels, less historic costs of doing business. Id.

To show that its lost profits exceeded $37,085.25, B.S.S.B. directs the Court to Huggins' projected revenue report, the hotel's tax bills, and an affidavit from Mr.

[5] The Court applies Georgia law to this contract dispute because Owners' Motion for Summary Judgment indicates that the insurance contract is governed by Georgia law and B.S.S.B. has not argued that another state's law applies.

Ghodiwala itemizing the normal monthly operating expenses of the hotel.[6] Owners argues that Huggins' projected revenue report is based on improper assumptions, and thus his conclusions cannot support B.S.S.B.'s additional lost profits claim.[7] The Court agrees.

In estimating the projected monthly revenue of the hotel in 2007, Huggins first determined the percentage increase in revenue for each month in 2006 from each month in 2005. He then took the monthly incomes in 2006 and multiplied them by the percent increase to project monthly revenues in 2007. For example, the October 2006 revenue was 2.82% greater than the revenue in October 2005; thus, the projected October 2007 revenue was $61,545.80, which was 2.82% greater than the revenue in October 2006.

Huggins' monthly 2007 revenue projections are problematic because they are based solely on the monthly revenues for two years of the hotel's operation history. Although the hotel did business before 2005, Huggins did not include in his calculations the hotel's revenues prior to 2005; thus, his conclusions are not based

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[6] B.S.S.B. states in its response brief that the hotel's tax bills, and Mr. Ghodiwala's affidavit are sufficient evidence from which a jury could determine lost profits. While it is true that juries can rely on this type of evidence, the issue in this case is whether this evidence shows that B.S.S.B. is entitled to more than $37.085.25 in lost profits. B.S.S.B. misses the mark in failing to point to figures showing it is reasonably certain its lost profits exceeded $37.085.25.

[7] Citing no law, Owners also argues that lost profits cannot be calculated solely on the testimony of lay witnesses. While there is complexity to calculating lost profits, the Court has found no case establishing a per se bar on lay witness testimony. The Court therefore assumes that Huggins' lay witness testimony would be admissible at trial.

on a sufficient history of the hotel's revenues. Because of this flaw, the Court finds that Huggins' projected revenue conclusions, though possible, are not reasonably certain.

The tax statements likewise do not show that it is reasonably certain the hotel's revenue would have increased so much that in the three months following the storm, B.S.S.B. would have turned a greater profit than $37,085.25. B.S.S.B. does not refer the Court to any figures or numbers in the tax returns to support its position. Thus, B.S.S.B. has merely made a conclusory allegation in its response brief. Conclusory allegations do not satisfy the non-movant's burden on summary judgment. Avirgan v. Hull, 932 F.2d 1572, 1577 (11th Cir. 1991).

The Court has nevertheless independently reviewed the tax statements and other record evidence showing B.S.S.B.'s gross monthly income in 2005, 2006, and 2007. From the numbers, the Court cannot find that it is reasonably certain that B.S.S.B.'s lost income for three months following the storm exceeded $37,085.25. Persuasive to the Court is that the total revenue of the hotel from July to October in 2005 was $21,950.46 and the total revenue from July to October in 2006 was $27,026.58. If the total revenue for the hotel in July through October of 2005 and 2006 never exceeded $30,000.00, then the Court cannot believe that the hotel's profit could have exceeded $37,085.25 during July through October of 2007.[8]

[8] B.S.S.B. may have been entitled to lost profits through November. Even so, the Court cannot find any evidence in the tax statements showing that lost profits paid through November would have exceeded $37,085.25.

Nor has B.S.S.B. presented evidence showing its expenses to a reasonable degree of certainty. Mr. Godiwhala's affidavit does not contain all of the operating costs of the hotel. Other record evidence establishes that, in addition to the expenses set forth in the affidavit, the hotel pays licensing fees, and owes fees to its officers. Without more reasonably certain evidence of the hotel's expenses, the Court cannot conclude that B.B.S.B. has proven it is reasonably certain its lost profits exceeded $37,085.25.

The Court notes that based on the hotel's profitability record, any award of lost profits under the policy is generous. In 2005, the hotel made no profit and lost $36,641.07, while in 2006 the hotel made a profit of $5,138.29. Ordinarily lost profits may be recovered only if the business "has a proven track record of profitability." Johnson County Sch. Dist. v. Greater Savannah Lawn Care, 629 S.E.2d 271, 274 (Ga. Ct. App. 2006) (citation omitted). Because there is no evidence showing B.S.S.B. has a proven track record of profitability, it would not be entitled to recover any lost profits, let alone more than $37,085.25.

Huggins' report concerning B.S.S.B.'s projected lost revenue, the tax returns, and Mr. Ghodiwala's affidavit do not contain any evidence showing that lost profits for the three months following the date of the storm exceeded $37,085.25. The Court has also not independently found other evidence in the record showing B.S.S.B. was entitled to more than what Owners paid under the policy. Accordingly, Owners' Motion for Summary Judgment is granted as to B.S.S.B.'s loss of business

income claim.

C. B.S.S.B.'s Claim for Bad Faith Under Ga. Code Ann. § 33-4-6

Section 33-4-6(a) provides that damages may be recovered for an insurer's bad faith conduct when: (1) the insurer refuses to pay a covered loss within 60 days after a demand for payment has been made by the insured; and (2) the court makes a finding that the insurer's refusal to pay was in bad faith. Ga. Code Ann. § 33-4-6. Penalties for bad faith are not authorized where the insurance company has any reasonable ground to contest the claim and where there is a disputed question of fact. Allstate Ins. Co. v. Smith, 597 S.E.2d 500, 503 (Ga. Ct. App. 2004).

The Court chooses to address first whether B.S.S.B. has presented evidence showing that Owners did not have any reasonable ground to contest the loss of business income claim or that there is no disputed question of fact.

In support of its assertion that Owners acted in bad faith, B.S.S.B. states that Owners has not "articulated any reason why it took from July 14, 2007 when the loss occurred until March 10, 2008 to pay any amount whatsoever of the loss of business income and extra expense [claims]." Owners responds that it did not pay B.S.S.B.'s claim for loss of business income until March 10, 2008, because up until then, there was a genuine dispute of what lost business income was owed to B.S.S.B. under the policy.

On September 13, 2007, B.S.S.B. provided Owners the amount of lost business income it believed it was owed under the policy. On October 19, 2007,

Owners wrote B.S.S.B. stating that it needed supporting documentation from B.S.S.B. before it could consider a loss of business income claim.[9] Owners then hired Cason to determine what lost profits were owed to B.S.S.B. Owners did not receive Cason's report until February 20, 2008.

Aside from the mere passage of time, B.S.S.B. has pointed to no evidence that Owners acted in bad faith in paying $37,085.25 in lost business income on March 10, 2008. Owners, however, has presented evidence showing that the reason for the delay was because there was a dispute over how much was owed under the lost business income provision of the policy. From this evidence, the Court grants summary judgment to Owners on B.S.S.B.'s claim for bad faith.

D. Consequential Damages

B.S.S.B. states in its complaint that it is entitled to consequential damages due to Owners failure to timely investigate and pay B.S.S.B.'s claims. In its response brief, B.S.S.B. argues that Owners refused to timely pay its claims. Thus, B.S.S.B. seeks consequential damages for Owners' alleged delay in paying B.S.S.B.'s claims.

The Court finds that B.S.S.B.'s claim for consequential damages falls within Georgia's insurer bad faith statute, Ga. Code Ann. § 33-4-6. The statute exists to "penalize insurers that delay payments without good cause." Howell v. Southern Heritage Ins. Co., 448 S.E.2d 275, 275 (Ga. Ct. App. 1994).

[9] B.S.S.B. has not argued that Owner's request for additional documentation was unreasonable.

Section 33-4-6 provides the exclusive remedy for an insurer's bad faith refusal to pay insurance proceeds. McCall v. Allstate Ins. Co., 310 S.E.2d 513, 515-16 (Ga. 1984). As a result, B.S.S.B. has no independent claim for consequential damages. Summary judgment is granted to Owners on this claim.

IV. CONCLUSION

For the foregoing reasons, Owners' Summary Judgment Motion is granted and its Motion to Exclude John Huggins as an Expert Witness is denied as moot.

SO ORDERED, this the 20th day of January, 2010.

s/ Hugh Lawson
HUGH LAWSON, SENIOR JUDGE

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Back

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

SKI SHAWNEE, INC., Plaintiff, v. COMMONWEALTH INSURANCE COMPANY, Defendant.	NO. 3:09-CV-02391 (JUDGE CAPUTO)

MEMORANDUM

Presently before the Court is Defendant Commonwealth Insurance Company's ("Commonwealth") Motion for Summary Judgment. (Doc. 9.) For the reasons discussed more fully below, Defendant's motion will be granted. This Court has jurisdiction pursuant to 28 U.S.C. § 1332.

BACKGROUND

On February 8, 2008, a bridge collapsed on Hollow Road in Shawnee-on-Delaware, Pennsylvania. (Doc. 12 at ¶ 7.) Hollow Road is the main route for ingress to the Plaintiff's ski resort and feeds into the southern entrance of the resort. (*Id.*) As a result of the bridge collapse, the Pennsylvania Department of Transportation ("PENN DOT") closed Hollow Road to the public on February 9 and 10, 2008, during which time bridge repairs were completed. (*Id.*) Approximately seventy percent (70%) of Plaintiff's patrons access the resort by Hollow Road. (Doc. 9, Ex. C.)

At the time of this incident Plaintiff Ski Shawnee, Inc. ("Ski Shawnee") had a insurance policy with Commonwealth that included business income loss coverage. This coverage stated that:

> We [Commonwealth] will pay you [Ski Shawnee] for the actual loss of Business Income you sustain due to the necessary "Suspension" of your "Operations" during the "Period of Restriction." The "Suspension" must be caused by direct physical loss of or damage to property at the covered premises at the named locations stated in either Coverage Part II or Coverage Part III Declarations and for which a Business Income Limit of Insurance is shown in the Declarations. [1]

The "Covered Property" under the policy includes Buildings, Business Personal Property (such as furniture and equipment), and Personal Property of Others. The policy also includes coverage for:

> [T]he actual loss of Business Income you [Ski Shawnee] sustain and necessary Extra Expenses you incur caused by action of civil authority that prohibits access to the covered premises at the named locations stated in either the Coverage Part II or Coverage Part III Declarations due to direct physical loss of or damage to property adjacent to the covered premises.

On February 20, 2008, Ski Shawnee filed a claim for loss with its insurance agent/broker The Richardson Group. (Doc. 9, Ex. B.) At some point after receiving notice of Plaintiff's insurance claim, Commonwealth retained McLarens Young International ("MYI") to assist with the investigation as claims adjusters; MYI, in turn, retained Michael A. Castillo, CPA, to assist with the loss of business income claim. (Doc. 12 at ¶ 10.) On February 22, 2008, Mr. Castillo contacted Ski Shawnee requesting information regarding the claim. (Doc. 12 at ¶ 11.) Ski Shawnee sent a letter to Mr. Castillo, on March 4, 2008, enclosing records of income loss and estimating that the business interruption loss totaled $118,500. (Doc. 9, Ex. C.) Mr. Castillo responded on March 18, 2008, seeking more documents of past income, in order to properly calculate the business income lost as a result of the bridge collapse and subsequent closing of Hollow Road. (Doc. 9, Ex. D.)

[1] "Suspension" is defined in the policy as "[t]he slowdown or cessation of your business activities."

On March 21, 2008, MYI sent a letter to Ski Shawnee, explaining that "[t]he information thus far provided regarding your loss indicates possible involvement of questions of coverage and/or violations of the terms and conditions of the policy of insurance, which may have a material bearing on the insurer's liability in this matter. In order to fully resolve these questions, an investigation will be undertaken and a final decision by the insurer will be deferred." (Doc. 9, Ex. E.) On April 11, 2008, Castillo sent a letter to Ski Shawnee advising that he had not received the documents requested in the letter of March 18, 2008. (Doc. 9, Ex. G.) On April 17, 2008, Ski Shawnee sent Mr. Castillo a letter stating "[w]e enclose all of the information requested in your letter dated March 18, 2008." (Doc. 21.)

On July 8, 2008, MYI alerted Ski Shawnee that "there is no coverage under this policy of insurance for your loss of income that resulted from the closure of the bridge." (Doc. 9, EX. H.) Counsel for Ski Shawnee sent a letter to MYI on September 25, 2008, stating the "[w]hile some of Shawnee's customers were able to access the ski area by traversing roads that entered the ski area from the north, the northern route was neither the publicized nor generally recognized route of ingress to the ski area." (Doc. 9, Ex. I.) On October 2, 2008, MYI told Ski Shawnee that it had forwarded Ski Shawnee's counsel's letter to Commonwealth and would be providing a formal reply in due course. (Doc. 9, Ex. J.) Counsel for Commonwealth responded to Ski Shawnee on October 29, 2008, reiterating that Commonwealth would not provide coverage under the policy and citing applicable case law. (Doc. 9, Ex. K.) On June 24, 2009, Ski Shawnee's counsel sent a letter to Commonwealth, re-asserting the position that coverage was due under the policy. (Doc. 9, Ex. L.) On July 27, 2009, Commonwealth's counsel again stated that coverage was not owed under the policy. (Doc. 9, Ex. M.)

Plaintiff then filed the instant action in the Court of Common Pleas of Monroe County, bringing causes of action for breach of contract (Count I), breach of the Pennsylvania Unfair Insurance Practices Act (Count II), and bad faith pursuant to 42 PA. CONS. STAT. ANN. § 8371 (Count III). Commonwealth removed the case to federal court on December 4, 2009. On April 21, 2010, Commonwealth filed its Motion for Summary Judgment. (Doc. 9.) This motion has been fully briefed and is currently ripe for disposition.

LEGAL STANDARD

Summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2). A fact is material if proof of its existence or nonexistence might affect the outcome of the suit under the applicable substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

Where there is no material fact in dispute, the moving party need only establish that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c)(2). Where, however, there is a disputed issue of material fact, summary judgment is appropriate only if the factual dispute is not a genuine one. Anderson, 477 U.S. at 248. An issue of material fact is genuine if "a reasonable jury could return a verdict for the nonmoving party." Id. Where there is a material fact in dispute, the moving party has the initial burden of proving that: (1) there is no genuine issue of material fact; and (2) the moving party is entitled to judgment as a matter of law. See Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure: Civil 2D § 2727 (2d ed. 1983). The moving party may present its own evidence or, where the nonmoving party has the burden of proof, simply point out to the Court that "the

nonmoving party has failed to make a sufficient showing on an essential element of her case." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

All doubts as to the existence of a genuine issue of material fact must be resolved against the moving party, and the entire record must be examined in the light most favorable to the nonmoving party. White v. Westinghouse Elec. Co., 862 F.2d 56, 59 (3d Cir. 1988). Once the moving party has satisfied its initial burden, the burden shifts to the non-moving party to either present affirmative evidence supporting its version of the material facts or to refute the moving party's contention that the facts entitle it to judgment as a matter of law. Anderson, 477 U.S. at 256-57. The Court need not accept mere conclusory allegations, whether they are made in the complaint or a sworn statement. Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888 (1990). In deciding a motion for summary judgment, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson, 477 U.S. at 249.

DISCUSSION

1. COUNT I- Breach of Contract

The interpretation of an insurance contract is a question of law for the court to decide. *Reliance Ins. Co. v. Moessner*, 121 F.3d 895, 900 (3d Cir. 1997) (citing *Standard Venetian Blind v. Am. Empire Ins. Co.*, 469 A.2d 563, 566 (Pa. 1983)). A court must give effect to the plain language of the insurance contract read in its entirety. *Reliance*, 121 F.3d at 901. When the language of an insurance policy is ambiguous, the provision must be construed in favor of the insured. *Reliance*, 121 F.3d at 900-01 (citing *Standard Venetian Blind Co.*, 469 A.2d at 566). Contract language is ambiguous if it is reasonably susceptible

to more than one construction and meaning. *Bowersox v. Progressive Cas. Ins. Co.*, 781 A.2d 1236, 1239 (Pa. Super. 2001) (citing *Hutchinson v. Sunbeam Coal Corp.*, 519 A.2d 385, 390 (Pa. 1985)). However, the language of an insurance policy may not be stretched beyond its plain meaning to create an ambiguity. *Madison Constr. Co. v. Harleysville Mut. Ins. Co.*, 735 A.2d 100, 106 (Pa. 1999).

As for the coverage listed under "Business Income," that provision does not apply because the loss at issue due to the "suspension" of Plaintiff's "operations" was not the result of a "direct physical loss of or damage to property at the covered premises." The damage was done to a bridge located on Hollow Road south of the Plaintiff's property. By the plain and unambiguous language of the insurance policy, this coverage does not apply to the case presented here.

The other possibly applicable portion of the policy is the civil authority coverage, which provides that Commonwealth will pay for any loss of business income that is "caused by action of civil authority that prohibits access to the covered premises . . . due to direct physical loss of or damage to property adjacent to the covered premises." Neither party argues that PENN DOT's closing of the bridge on Hollow Road was an action of civil authority. Nor do they argue that there was damage to property adjacent to the covered premises. Instead, this argument centers around whether PENN DOT's actions prohibited access to Plaintiff's premises.

When the action of a civil authority completely shuts down access to a party's premises, federal courts have held that the coverage in insurance policies similar to the one at bar are triggered. *Narricot Industries, Inc. v. Fireman's Fund Ins. Co.*, No. CIV.A.01-4679, 2002 WL 31247972, at *4-5 (E.D. Pa. Sept. 30, 2002). However, where the action of a civil

authority merely hinders access to the covered premises, without completely prohibiting access, federal courts have held that such action is not covered under policies like the one in the instant case. *Southern Hospitality, Inc. v. Zurich American Ins. Co.*, 393 F.3d 1137, 1140-41 (10th Cir. 2004); *see also Abner, Herrman & Brock, Inc. v. Great Northern Ins. Co.*, 308 F. Supp.2d 331, 336-37 (S.D.N.Y. 2004).

In *Narricot*, the plaintiff's facilities in North Carolina were located in an area that was ravaged by Hurricane Floyd. *Narricot*, 2002 WL 31247972, at *1. The town in which the facilities were located suspended the operation of all plants, including plaintiff's, and hand-delivered a letter to each plant advising them that must cease operations because the water system was being shut down. *Id.* The United States District Court for the Eastern District of Pennsylvania held there was no genuine issue of fact that the town's initiatives were "actions of civil authority that prohibited access to the described premises." *Id.* at *4 (internal quotations omitted).

In *Southern Hospitality*, plaintiffs managed a number of hotels that were highly dependent on air travel. 393 F.3d at 1138. Following the attacks of September 11, 2001, the Federal Aviation Administration ("FAA") cancelled numerous flights and many airports were closed, causing plaintiffs' profits to decline sharply. *Id.* The Tenth Circuit Court of Appeals held that the civil authority coverage was not triggered, reasoning that access to plaintiffs' hotels had not been prohibited, but only hindered, because the FAA did not close the hotels and they could still be accessed by other modes of transportation. *Id.* at 1140-41. Other courts presented with a similar scenario have held the same. *See Abner, Herrman & Brock, Inc.*, 308 F. Supp.2d at 336-37; *see also Bienville Partners Ltd. v. Assurance Company of*

America, No. Civ.A. 02-106, 2002 WL 31996014, at *1 (E.D. La. Sept. 30, 2002).

This case is more like the line of cases presented by *Southern Hospitality* than *Narricot*. There is no genuine issue of material fact that at least some of Ski Shawnee's customers were able to access the ski resort via alternate routes on the dates in question. Even though some of the customers, even the majority of the customers, were hindered or dissuaded from frequenting Plaintiff's resort on the weekend that the bridge was being repaired, that does not mean that they were *prohibited* from accessing the premises. Without a complete inability to access the premises, or a forced closing by a civil authority, the coverage at issue here is not applicable. Thus, coverage was not available in this instance and summary judgment will be granted in favor of Defendant on this count.

2. COUNT II- Unfair Insurance Practices Act

Plaintiff's second claim is brought pursuant to various provisions of the Pennsylvania Unfair Insurance Practice Act ("UIPA"), 40 PA. CONS. STAT. ANN. §1171.1-1171.15, and the Unfair Claims Settlement Practices regulations ("UCSP"), 31 Pa. Code § 146.1-146.10. However, "[t]he UIPA does not create a private cause of action for citizens." *Oehlmann v. Metropolitan Life Ins. Co.*, 644 F. Supp.2d 521, 531 (M.D. Pa. 2007). Instead, "the UIPA and the UCSP are designed to be implemented and enforced by the Insurance Commissioner of Pennsylvania." *Id.* As such, Plaintiff, as a private citizen, cannot maintain a claim against Defendant on these statutory and regulatory sections, and Defendant's motion will be granted on this count as well.

3. COUNT III- Bad Faith

Finally, Plaintiff brings a claim for bad faith pursuant to 42 PA. CONS. STAT. ANN. §

8371. To succeed on its bad faith claim, Ski Shawnee must prove that 1) the insurer did not have a reasonable basis for denying benefits under the policy, and 2) the insurer knew of or reckless disregarded its lack of a reasonable basis in denying the claim. *Oehlmann*, 644 F. Supp.2d at 528 (citing *Northwestern Mutual Life Ins. Co. V. Babayan*, 430 F.3d 121, 137 (3d Cir. 2005)). "If there is a reasonable basis for denying resolution of a claim, even if it is clear that the insurer did not rely on that reason, there cannot, as a matter of law, be bad faith." *Williams v. Hartford Cas. Ins. Co.*, 83 F.Supp.2d 567, 574 (E.D. Pa.2000).

There is no genuine issue of material fact that Defendant had a reasonable basis for denying the resolution of the claim at bar. In fact, this Court has already decided the policy did not include coverage for the loss of profits resulting from the closing of Hollow Road. It was reasonable for Commonwealth to believe that coverage should be denied when there was no direct property damage on the premises, nor was there action by a civil authority prohibiting access to the premises. As such, Plaintiff cannot prove the first prong of the test for bad faith under Pennsylvania law. Therefore, summary judgment will be granted on this claim.

CONCLUSION

For the foregoing reasons, Defendant's Motion for Summary Judgment is granted. An appropriate Order follows.

7/6/2010
Date

/s/ A. Richard Caputo
A. Richard Caputo
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

SKI SHAWNEE, INC., Plaintiff, v. COMMONWEALTH INSURANCE COMPANY, Defendant.	NO. 3:09-CV-02391 (JUDGE CAPUTO)

ORDER

NOW, this 6th day of July 2010, **IT IS HEREBY ORDERED** that:

(1) Defendant's Motion for Summary Judgment (Doc. 9) is **GRANTED**.

(2) **JUDGMENT IS ENTERED** in favor of Defendants.

(3) The Clerk of Court shall mark this case as **CLOSED**.

/s/ A. Richard Caputo

A. Richard Caputo
United States District Judge

Back

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DIVISION ONE
FILED: 01/28/2010
PHILIP G. URRY, CLERK
BY: GH

AZTAR CORPORATION, a Delaware Corporation, Plaintiff/Appellant, v. U.S. FIRE INSURANCE COMPANY; WESTCHESTER SURPLUS LINES INSURANCE COMPANY; ESSEX INSURANCE COMPANY; CERTAIN UNDERWRITERS AT LLOYD'S, LONDON; AXIS SPECIALTY LIMITED; HARTFORD FIRE INSURANCE COMPANY; ZURICH AMERICAN INSURANCE COMPANY, Defendants/Appellees.	)	1 CA-CV 08-0562 DEPARTMENT T **O P I N I O N**

Appeal from the Superior Court in Maricopa County

Cause No. CV2004-006528

The Honorable Janet E. Barton, Judge

AFFIRMED

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B A R K E R, Judge

¶1 We address in this opinion, among other issues, what the term "interruption of business, whether total or partial" means in this contract of insurance.

Facts and Procedural History

1. Tropicana Expansion Project

¶2 At all times relevant to this appeal, Appellant Aztar Corporation ("Aztar"), a Phoenix-based corporation, owned and operated the Tropicana Casino and Resort ("Tropicana") in Atlantic City, New Jersey. In 2002, Aztar began an expansion at a site adjacent to the Tropicana. The twenty-seven story expansion included dining, retail, and entertainment venues on the lower levels, an eight-story parking garage above the lower levels, and seventeen levels of hotel rooms on the top. A walkway and valet bridge would connect the expansion structure to the Tropicana. The expansion was scheduled for completion and the opening of business on April 15, 2004.

¶3 While under construction, on October 30, 2003, six floors of the expansion collapsed. It took Aztar until November 30, 2004 to clean up the debris, rebuild the expansion, and open it to the public. The collapse caused a seven-month delay in utilizing the expansion.

¶4 Due to the collapse, the New Jersey government temporarily shut down the main entry street to the Tropicana, a pedestrian bridge, the Tropicana's bus terminal, an existing

parking structure, and the Tropicana's west hotel tower. The Tropicana itself did not sustain any physical damage from the collapse and remained fully operational aside from the temporary access closures ordered by New Jersey authorities. In the months following the collapse, the Tropicana experienced a decrease in patronage at the casino and hotel. This resulted in a claimed $105 million loss. Aztar submitted claims to its insurance carriers to cover loss from the collapse and interruption of the Tropicana's business.

2. Aztar's Insurance Coverage

¶5 Lexington Insurance Company ("Lexington") issued Aztar's primary layer of property insurance. In addition, Aztar purchased second and third layers of excess policies from Appellees U.S. Fire Insurance Company, Westchester Surplus Lines Insurance Company, Essex Insurance Company, Axis Specialty Limited, Hartford Fire Insurance Company, Zurich American Insurance Company, and Certain Underwriters at Lloyd's, London (the "Excess Insurers"). All of the policies, issued by the Excess Insurers, incorporated the terms of the Lexington policy.[1] For this reason, we refer to the language of the Lexington

[1] We accept, without deciding, Aztar's position that Zurich American Insurance Company agreed to "follow form" to the Lexington policy, i.e. that Zurich American's policy terms did not differ from the Lexington policy. Therefore, we do not address coverage issues as they relate to Zurich American separately.

policy (the "Policy"). The expansion was to be endorsed onto the Policy on April 1, 2004.

¶6 Part II, ¶ 1 of the Policy provides Aztar with business interruption coverage. Part II, ¶ 2 of the Policy contains seven extensions of coverage including contingent business interruption, impaired ingress/egress, and business interruption due to a government order that impairs access. The relevant provisions of the Policy state:

PART II

BUSINESS INTERRUPTION AND EXTRA EXPENSE INCLUDING CONTINGENT BUSINESS INTERRUPTION AND EXPEDITING EXPENSE

1. COVERAGE - This policy insures against loss resulting directly from necessary interruption of business, whether total or partial, caused by damage to or destruction of all real or personal property, manuscripts and watercraft, by the peril(s) insured against, during the term of this policy, on premises situate per the Territorial Limits in this policy.

2. This policy is extended to cover:

   . . . .

   c. The actual loss sustained by the Insured resulting directly from an interruption of business, and the necessary extra expense incurred by the insured, during the length of time not exceeding thirty (30) consecutive days and subject to a sublimit of $20,000,000 per occurrence, as a direct result of damage to or destruction of property within five (5) miles of the Insured's premises, caused

by or resulting from a covered peril(s), access to such described premises is specifically prohibited by order of civil or military authority.

d. The loss sustained during the period of time not exceeding thirty (30) consecutive days and subject to a sublimit of $20,000,000 per occurrence when the Insured's operations would normally have taken place when, as a direct result of damage within five (5) miles of the Insured's premises by a peril insured against, access to or egress from real or personal property of the Insured is impaired.

. . . .

f. Loss resulting from the necessary interruption of business conducted by the Insured, and the necessary extra expense incurred by the Insured, subject to a sublimit of liability of $50,000,000 per occurrence, caused by damage or destruction by a peril not excluded herein occurring during the term of this policy to real or personal property of the Insured's suppliers or customers or of contributing or recipient properties of the Insured.

g. The actual loss sustained by the Insured resulting directly from the interruption of business, as covered by this policy, for such additional length of time as would be required with the exercise of due diligence and dispatch to restore the Insured's business to the condition that would have existed had no loss occurred, commencing with the later of the following dates:

(1) the date on which the liability of this Company for loss resulting from interruption of business would

terminate if this endorsement had not been attached to this policy; or

(2) the date on which repair, replacement or rebuilding of such part of the building(s), structure(s), machinery, equipment, or furniture and fixtures of the property herein described as has been damaged or destroyed is actually completed;

but in no event shall this coverage apply for more than 365 days after the commencement date as defined above. In all other respects, the terms and conditions of this policy remain unchanged and are applicable to this extension coverage.

. . . .

12. RESUMPTION OF OPERATIONS – It is a condition of this insurance that:

a. Applicable only to loss of earnings, if the insured could reduce the loss,

(1) by complete or partial resumption of operation of the property herein described, whether damaged or not, or
. . . .

Such reduction shall be taken into account in arriving at the amount of loss hereunder;

. . . .

¶7 Aztar submitted business interruption claims to Lexington and the Excess Insurers. Lexington accepted the civil authority and ingress and egress claims under Part II, ¶¶ 2.c and 2.d but denied coverage under the claims for business interruption (Part II, ¶ 1) and contingent business interruption

(Part II, ¶ 2.f) because the collapse did not close any part of the Tropicana that suffered loss. Similarly, the Excess Insurers denied business interruption and contingent business interruption coverage asserting coverage is only available if the collapse damaged the Tropicana or otherwise caused it to shut down. The Excess Insurers also denied excess coverage of ingress/egress and civil authority claims.

3. Procedural History

¶8 Aztar sued Lexington and the Excess Insurers to recover loss due to decreased patronage at the casino and hotel under Part II of the Policy. Aztar dismissed Lexington after it paid the $5 million policy limit, $3.5 million of which covered loss from government closure of the bus terminal, main entry street, parking structure, and west hotel tower.

¶9 Aztar and the Excess Insurers filed cross-motions for partial summary judgment on several issues, some of which form the basis of this appeal. On April 26, 2007, the trial court denied Aztar's cross-motion for partial summary judgment and granted partial summary judgment in favor of the Excess Insurers. As part of its ruling, the trial court determined "necessary interruption of business, whether total or partial" does not include loss from decreased patronage at the Tropicana hotel and casino because the Tropicana was not damaged by the collapse and remained fully operational. The trial court found

an issue of fact regarding whether the expansion was covered by the Policy when it collapsed. This finding, however, did not affect the outcome based on the trial court's conclusion that there was no business interruption. The trial court also held contingent business interruption coverage under Part II, ¶ 2.f was not available because the expansion was not a "contributing" property and loss from decreased patronage was not a business interruption. Finally, the trial court held that the thirty-day indemnity periods in the civil authority and ingress/egress provisions in Part II, ¶¶ 2.c and 2.d are separate extensions of coverage from the 365-day indemnity provision in Part II, ¶ 2.g. The trial court denied Aztar's motion for partial reconsideration.

¶10 Essex Insurance Company, Zurich American Insurance Company, Axis Specialty Limited, Hartford Fire Insurance Company, and Certain Underwriters at Lloyds, London (the "Certain Excess Insurers")[2] filed applications for attorneys'

[2] As a result of the trial court's ruling on the cross-motions for partial summary judgment, Aztar had some claims disposed of, but some remained against the Excess Insurers in addition to those on appeal. The remaining claims were subsequently settled or dismissed at different times. After the entry of final judgment, U.S. Fire Insurance Company and Westchester Surplus Lines Insurance Company did not seek fees in the trial court. Accordingly, we use the term "Certain Excess Insurers" in this opinion to describe those of the Excess Insurers who were awarded fees below that Aztar contests on appeal.

fees and costs in August and September 2007. Aztar objected to each motion. Although the motions were untimely under Arizona Rule of Civil Procedure ("ARCP") 54(g)(2), the trial court summarily overruled Aztar's objections and awarded attorneys' fees and costs to the Certain Excess Insurers when Aztar could not demonstrate how it was prejudiced by the untimely filings.

¶11 Aztar timely filed a notice of appeal on June 30, 2008. On appeal, Aztar argues the trial court erred in denying Aztar's cross-motions for summary judgment and in granting summary judgment in favor of the Excess Insurers. Aztar also argues the trial court abused its discretion in awarding attorneys' fees and costs to the Certain Excess Insurers.

¶12 We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1), (B) and 12-2101(B) (2003).

Discussion

1. Business Interruption Claims

¶13 Summary judgment is appropriate when there is "no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). We review a grant of summary judgment *de novo* to decide whether any genuine issues of material fact exist and whether the trial court erred in applying the law. *Urias v. PCS Health Sys., Inc.*, 211 Ariz. 81, 85, ¶ 20, 118 P.3d 29, 33 (App.

2005). We review the facts and reasonable inferences in the light most favorable to the party against whom judgment was entered. *Prince v. City of Apache Junction*, 185 Ariz. 43, 45, 912 P.2d 47, 49 (App. 1996).

¶14 In this case, the trial judge granted summary judgment in favor of the Excess Insurers because Aztar's operational capacity was not diminished. As we explain in detail below, we reject this reasoning but determine that Aztar nonetheless does not qualify for coverage under the policy terms at issue for other reasons asserted by the Excess Insurers.

a. Meaning of "Necessary Interruption of Business, Whether Total or Partial"

¶15 Aztar submitted claims to the Excess Insurers for business interruption coverage under Part II, ¶ 1 of the Policy. Part II, ¶ 1 of the Policy states:

> This policy insures against loss resulting directly from necessary interruption of business, whether total or partial, caused by damage to or destruction of all real or personal property, manuscripts and watercraft, by the peril(s) insured against, during the term of this policy, on premises situate per the Territorial Limits in this policy.

¶16 The disputed issue is whether the Policy covers Aztar's loss of revenue due to decreased patronage at the casino and hotel following the collapse and subsequent delay of the

expansion.[3] Aztar contends "interruption of business, whether total or partial" covers loss from decreased patronage, so long as the decreased patronage is brought about by a covered peril. The Excess Insurers argue there is no coverage for decreased patronage and attendant lost revenues because the Tropicana was still able to function at full capacity. The trial court agreed with the Excess Insurers. Because we reject the legal proposition that the terms "interruption of business, whether total or partial" cannot ever be construed to include decreased patronage, we agree with Aztar that the trial court erred in entering summary judgment on this ground.

i.

¶17 In construing a contract, we "give words their ordinary, common sense meaning." *A Tumbling-T Ranches v. Flood Control Dist. of Maricopa County*, 220 Ariz. 202, 209, ¶ 23, 204 P.3d 1051, 1058 (App. 2008). Pertinent to the insurance contract here, our supreme court has instructed that "in construing the meaning of an insurance policy, the language used

[3] Although Aztar also argues the trial court failed to consider evidence that the collapse caused a direct shutdown of parts of the Tropicana (an existing parking structure, the bus terminal, the main entry street, and the west hotel tower), Aztar received compensation for these temporary closures by Lexington under the civil authority and ingress/egress provisions. New Jersey authorities and impaired access to the Tropicana caused these temporary closures. Therefore, we do not consider these temporary shutdowns under the standard business interruption and contingent business interruption provisions.

should be viewed from the standpoint of the average layman who is untrained in the law or insurance." *Sparks v. Republic Nat'l Life Ins. Co.*, 132 Ariz. 529, 537, 647 P.2d 1127, 1135 (1982). "If a clause appears ambiguous, we interpret it by looking to legislative goals, social policy, and the transaction as a whole." *First Am. Title Ins. Co. v. Action Acquisitions, LLC*, 218 Ariz. 394, 397, ¶ 8, 187 P.3d 1107, 1110 (2008).

¶18 The construction of the clause at issue here is one of first impression in Arizona.[4] The Excess Insurers point us to

[4] None of the parties assert that there is a choice of law issue in this matter. The Excess Insurers and Aztar have treated this matter as though Arizona law (to the extent there is any) is to be applied to the construction of the insurance contract and all other issues. There is a choice of law provision in the Policy that provides: "This policy shall be construed under the laws of the United States of America whose courts shall have sole jurisdiction hereunder." We consider this provision to essentially be intended in those situations (not present here) that might involve a question of law to which the laws of a foreign nation may apply. Because the parties have treated this matter as arising under Arizona law, and there is a basis to do so, see *Bryant v. Silverman*, 146 Ariz. 41, 44 n.2, 703 P.2d 1190, 1193 n.2 (1985) (limiting analysis to issue presented by parties of whether Arizona or Colorado law applied because parties did not argue that New Mexico or Texas law should apply and only analyzing "contacts of New Mexico or Texas when such contacts would favor application of Arizona or Colorado law"), we apply Arizona law. We do not, however, address whether another state's law could have also been applied. *See, e.g.*, Restatement (Second) of Conflict of Laws § 193 (1971). That issue was not presented to us and has been waived. *Childress Buick Co. v. O'Connell*, 198 Ariz. 454, 459, ¶ 29, 11 P.3d 413, 418 (App. 2000) ("Our policy, and the policy of most appellate courts, is that issues not clearly raised in appellate briefs are deemed waived.").

several cases from other jurisdictions construing business interruption clauses and urge that we follow their holdings that reduced patronage is not covered. *E.g., Ramada Inn Ramogreen, Inc. v. Traveler's Indem. Co. of Am.*, 835 F.2d 812 (11th Cir. 1988); *Omaha Paper Stock Co. v. Harbor Ins. Co.*, 596 F.2d 283 (8th Cir. 1979). Our first inquiry, however, as the Arizona authorities above direct, is the language of the contract itself. It is to that language we first turn.

ii.

¶19 The critical phrase to be considered is "loss resulting directly from necessary *interruption of business, whether total or partial*." (Emphasis added.) The Excess Insurers argue "interruption" is most frequently defined as "stoppage" or "cessation," while Aztar points to other dictionary definitions that define the term as "to hinder or stop." For our purposes, we consider a standard, common sense definition to include the following: "1: to stop or hinder by breaking in 2: to break the uniformity or continuity of." Merriam-Webster's Collegiate Dictionary 611 (10th ed. 2001). Thus, either party's definition of "interruption" is reasonable in this setting.

¶20 The addition of the phrase "total or partial" also makes it plain that any stoppage, or hindrance, need not impact the entire "business" but only a portion. We do not, however,

conclude that the use of the term "or partial" can only be given meaning by allowing coverage for reduced patronage. It can be applied, as the Excess Insurers argue, to mean the complete stoppage of a *portion* of an insured's business as contrasted with stoppage of the *entirety* of an insured's business. *Compare Omaha Paper*, 596 F.2d at 289 (finding coverage under "partial suspension of business" provision where a fire partially interrupted insured's processing plant), *with Forestview The Beautiful, Inc. v. All Nation Ins. Co.*, 704 N.W.2d 773, 775-76 (Minn. App. 2005) (denying insured coverage for partial interruption of business due to damage from Hurricane Katrina under "necessary suspension" provision when there was no reference to "total or partial").

iii.

¶21 We turn now to the term "business." The construction of this term is critical to our analysis. The trial court considered the term "business" to be the equivalent of "operations" or "use." For example, the trial court stated: "In this Court's opinion, the business interruption provisions in Defendants' policies would only provide coverage if the exiting [sic] hotel and casino were *unable to operate* at their full capacity due to the expansion project collapse. It is undisputed that the expansion project collapse did not prevent the Tropicana's existing hotel and casino from *operating at its*

full capacity." (Emphasis added.) To be sure, some other jurisdictions have used that definition. *E.g., Ramogreen*, 835 F.2d at 813-15 (finding that a decline in hotel occupancy due to fire in hotel restaurant was not an "interruption of the insured's business" where hotel rooms were available for use); *Nat'l Children's Expositions Corp. v. Anchor Ins. Co.*, 279 F.2d 428, 430 (2nd Cir. 1960) (finding that loss due to decreased attendance at exhibition was not an interruption of business because snowstorm did not make any portion of exhibition building unusable); *Hotel Prop., Ltd. v. Heritage Ins. Co. of Am.*, 456 So.2d 1249, 1250 (Fla. Dist. App. 1984) (denying business interruption coverage for decline in hotel room occupancy following fire in hotel restaurant); *Howard Stores Corp. v. Foremost Ins. Co.*, 82 A.D.2d 398, 401-02 (N.Y. App. Div. 1981) (denying business interruption coverage for lower than projected sales where insured's three stores did not suspend business operations when water damaged one store); *Keetch v. Mut. of Enumclaw Ins. Co.*, 831 P.2d 784, 786-87 (Wash. App. 1992) (denying coverage for "interruption of business" for decline in occupancy at motel because falling ash from volcano explosion did not decrease the availability of rooms).

¶22 We do not take lightly the holdings based on the law in other states. However, in some of those cases the precise policy language differs from that at issue here. *E.g., New*

England Gas & Elec. Ass'n v. Ocean Accident & Guarantee Corp., 116 N.E.2d 671, 684 (Mass. 1953) (referring to a "use and occupancy endorsement" for the "business interruption" coverage). Considering whether the "use" of one's premise has been hindered or stopped may lead to a substantially different analysis than whether one's "business" has been hindered or stopped. Additionally, many of the cases from other jurisdictions refer to the historical roots of "business interruption" insurance as arising out of "use and occupancy" insurance. *Ramogreen*, 835 F.2d at 814 ("[T]he purpose of a business interruption policy is to indemnify the insured 'for loss caused by the interruption of a going business consequent upon the destruction of the building, plant, or parts thereof . . . [t]his type of insurance is usually called use and occupancy insurance.'" (citation omitted)); *Omaha Paper*, 596 F.2d at 288 ("The term 'use and occupancy' is generally used interchangeably with the term 'business interruption.'").

¶23 Some of these cases construed policies that have language that uses the terms "business interruption" and "use and occupancy" interchangeably. *E.g., Omaha Paper*, 596 F.2d at 288 ("both [terms] used somewhat interchangeably in this contract"). In other cases, however, only the term "business interruption" is discussed. *Ramogreen*, 835 F.2d at 813-14 (referencing policy language only referring to "the necessary

interruption of insured's business" but treating it as "use and occupancy" insurance). In the policy language before us, however, there is only one reference to the term "use and occupancy." That reference is in Part I of the Policy pertaining to *property* coverage and is not found in Part II of the Policy, which pertains to business interruption coverage. Thus, while we may consider the origin of a particular term, we do not necessarily accept as definitions "commercial customs" that may be employed in the insurance industry, but are not reflected in the language of the policy. We focus on the commonly understood meanings of the words actually used. As stated in *Sparks*,

> [W]e are not concerned with what the "commercial customs" are in the insurance industry, but rather, what the ordinary person's understanding of the policy would be. . . . [I]n construing the meaning of an insurance policy, *the language used should be viewed from the standpoint of the average layman who is untrained in the law or insurance.*

132 Ariz. at 537, 647 P.2d at 1135 (emphasis added). Accordingly, we turn to the task of considering what the term "business" means to "the average layman."

¶24 In lay terms, there is simply no question that the term "business" is not limited to the "operation" or "ability to use" one's premises, as contrasted with a broader definition that also includes the ability to sell the services available or

the goods produced. Indeed, one would not be able to stay in "business" if one's production facility was not impaired, but there was no ability to sell any items produced. The following is a standard definition of "business:" "a usu. commercial or mercantile activity engaged in as a means of livelihood." Merriam-Webster's Collegiate Dictionary 154 (10th ed. 2001); *see also* The American Heritage Dictionary of the English Language 252 (4th ed. 2000) (defining "business" as "[v]olume or amount of commercial trade"). We are not aware of, nor have we been cited to, a common-sense, typical definition of the term "business" that would exclude the ability to *sell* one's products and only include the ability to *produce* products or make available services.

iv.

¶25 Without reference to competing lay definitions, the Excess Insurers point to the case law referenced above arguing we should construe that phrase to mean essentially "use or occupancy" of a premises. We do not believe such a restrictive definition comports with Arizona's requirement that we eschew technical jargon or "commercial customs" that are both unexplained and unincorporated in the terms of the insurance policy itself and in fact contrary to a commonly held view of the term in dispute. *See Sparks*, 132 Ariz. at 537, 647 P.2d at 1135. As applied to the competing definitions of "business"

offered here, a hypothetical helps make the point. *See In re Andrew C.*, 215 Ariz. 366, 370, ¶ 21, 160 P.3d 687, 691 (App. 2007) ("Frequently, hypothetical examples shed light on the viability, or lack thereof, of an asserted legal principle.").

¶26 Assume that an ice cream store is located in a remote area with no other accessible services. It has become a tourist attraction and tourists come simply to see its production and taste its frozen delicacies. Assume it is comprised of three separate buildings, all of which function at full capacity: Building One is where the ice cream is made and sold. Building Two is where the cows are housed that produce the milk necessary to manufacture the ice cream. Building Three is a parking facility that provides the only place where customers can park to make purchases at the store. Now, assume that one-half of Building Two (housing the cows) burns down, destroying one-half of the cows. The ice cream store has to cut its production in half. The store turns away one-half of its customers (as there is insufficient ice cream) with a concomitant loss of one-half of its income. Under the Excess Insurers' position, this loss would be covered because the ability to *produce* the ice cream and use the manufacturing aspect of the business has been reduced. On this theory, "operation" or "use" of the production facility was cut, meaning that "business" was interrupted.

¶27 Assume, however, that the same fire takes place at Building Three (the parking facility) instead of Building Two (housing the cows). One-half of the parking facility is destroyed and the number of parking places is cut in half. The business now turns away one-half of its customers (as there are insufficient places to park) with a concomitant loss of one-half of its income. Under the Excess Insurers' position, this loss would *not* be covered because the ice cream store still had the ability to *produce* the same amount of ice cream; the operation side of the business is still intact. From the lay person's perspective, however, and from ours, the "business" has still experienced the same one-half loss in income, regardless whether the damage was to the facility pertaining to the supply side of the business (the cows in Building Two) or to the facility pertaining to the demand side of the business (the parking places in Building Three). If the hypothetical ice cream store is able to prove its loss, and satisfy the other policy requirements, it would be entitled to recover from the insurer under these policy terms.

v.

¶28 Our conclusion that the term "business" has a meaning broader than "use of premise" is consistent with what is widely considered to be the seminal case on business interruption insurance, *Studley Box & Lumber Co. v. National Insurance Co.*,

154 A. 337 (N.H. 1931). In *Studley*, the insured operated a "shook factory."[5] *Id*. at 338. The factory had several structures including a saw mill and a barn. *Id*. The terms of the policy provided coverage based on "damage[] by fire . . . so as to necessitate a total or partial suspension of business." *Id*. at 337. The insured's business was partially interrupted after a fire burned the barn and some of the horses inside that were used to operate the insured's saw mill. *Id.* at 338-39.

¶29 Although the saw mill was in a different physical location than the barn where the fire occurred, the insured could not produce as much lumber as before the fire because there were fewer horses to aid in the sawing process. *Id.* at 338. In granting business interruption coverage, the court stated:

> The *business being conducted as a whole,* a fire loss on any of the units of the plant affects the business in its entirety and not merely the particular part of it carried on in such unit. *The units are mutually dependent, and, if one fails, the others ordinarily suffer*.

Id. (emphasis added). Though *Studley* applied to a property that affected the supply side, the principle *Studley* announced was equally applicable to destruction of a facility specifically

[5] A "shook" is a "set of staves and headings for one hogshead, cask, or barrel." Merriam-Webster's Collegiate Dictionary 1080 (10th ed. 2001).

intended to promote the demand side. Thus, *Studley* announced mutual dependency as a guiding principle in construing a business interruption clause. The court went on to state:

> *Without evidence to the contrary, the object of the policies is clear to insure against loss from the interruption of the business as a whole, whatever part of it may be conducted in or with the property which suffers from the fire.* While loss of a certain kind by fire is insured against, the nature of the loss is such that it is not important in this respect what part of the property sustains loss.

Id. (emphasis added).

¶30 In our hypothetical ice cream store, Buildings One, Two, and Three were mutually dependent upon each other. Following the principle announced in *Studley*, coverage should be provided regardless whether the damage was on the supply side (Building Two – housing the cows) or on the demand-related side (Building Three – parking for customers' cars).[6] Of course, utilizing our hypothetical example, the collapse of Aztar's

[6] Another hypothetical example that illustrates the point is as follows. Assume an enterprise spent substantial amounts of money building on-site signage to attract customers to its premises to purchase goods. The business can document the increase in customers, and accordingly, its "business" has significantly increased its income as a result of the signage it has constructed. Assume also that a covered peril destroys the signage. Although the production facility itself has not been impacted, the insured should nonetheless be entitled to coverage if the policy provides for interruption of its "business" as set forth here.

expansion is asserted to have had a similar impact on Aztar as the damage to the parking facility had to the ice cream store. Following this principle, "business" has been interrupted and the loss would fall within that term.

¶31 Other courts, however, have focused on the fact that the property damaged in *Studley* was the barn and horses that were used in production of the goods. Accordingly, those courts have limited the application of the principle of mutual dependency to the *operation* of a facility. *Omaha Paper*, 596 F.2d at 288; *Ramogreen*, 835 F.2d at 814.

¶32 For example, in *Ramogreen*, fire damage caused permanent closure of a separately insured restaurant located at the insured's hotel property. 835 F.2d at 813-14. The fire caused no damage to the hotel, and all rooms were available for use. *Id.* The policy at issue insured "against loss of earnings resulting directly from the necessary interruption of the insured's business" caused by a covered peril. *Id*. at 813. The case is factually similar to the one presented here. The insured filed a business interruption claim to cover loss incurred from the decline in hotel room occupancy resulting from the restaurant closure. *Id.* The insured claimed it was entitled to recover losses under the business interruption clause "for the decline in occupancy of the hotel facility that resulted from the closing of the restaurant." *Id.* The court,

however, found there was no mutual dependency between the restaurant and the hotel because the fire did not reduce hotel *operations.* *Id.* at 814. The court relied upon *Studley,* stating:

> Without the horses, the lumber plant was forced to suspend a portion of its operation. This is not the situation in the instant case where the *hotel operation was able to accommodate the same number of patrons, albeit their actual number of customers may have been reduced*.

Id. (emphasis added).

¶33 From our perspective, the concept of "mutual dependency" applies whether or not the structure that is damaged relates to producing the goods or services or providing the ability for customers to *purchase* the goods or services. For instance, assume in *Studley* it had not been the barn and the horses that produced the lumber that were damaged, but a different structure where customers tied and fed their horses necessary to make the trip back. If the destruction of this hypothetical structure had the same financial impact on the business, we doubt that the *Studley* court would have reached a contrary conclusion. Under either scenario, the shook factory would be unable to sell its wares. The principle of mutual dependency prevails. The fact that in one scenario the factory is still able to operate and produce its goods, but not *sell* them, is irrelevant as the "business [was] *being conducted as a*

whole . . . [t]he units are mutually dependent, and, if one fails, the others ordinarily suffer." *Studley*, 154 A. at 338. Thus, we disagree with the limiting interpretation that *Ramogreen* and related cases[7] have given to *Studley,* and which the trial court applied.

vi.

¶34 The Excess Insurers also argue that the resumption of operations provision in Part II, ¶ 12 of the Policy implies that a business interruption must fully or partially suspend the insured's operations. Paragraph 12 places a duty on Aztar to mitigate loss from an interruption of business by completely or partially resuming business. The Excess Insurers contend Aztar cannot resume operations to mitigate loss from decreased patronage at a fully operational business. On the contrary, when the parking facility was damaged in our hypothetical ice cream store, the business suffered a one-half loss of income. By repairing the parking facility, the ice cream store owner

[7] Aztar also cites to unreported memorandum decisions from federal district courts in support of its argument. We do not address or refer to these cases. *See* ARCAP 28(c); *Kriz v. Buckeye Petroleum Co., Inc.*, 145 Ariz. 374, 377 n.3, 701 P.2d 1182, 1185 n.3 (1985) (Arizona Rule of Civil Appellate Procedure ("ARCAP") 28(c) prohibits citation to unpublished federal as well as state court decisions). The case law interpreting ARCAP 28(c) can leave some room for confusion. ARCAP 28(c) prohibits citation to "[unpublished] memorandum decisions from any court." *Walden Books Co. v. Dep't of Revenue*, 198 Ariz. 584, 589, ¶ 23, 12 P.3d 809, 814 (App. 2000); *see also Hourani v. Benson Hosp.,* 211 Ariz. 427, ¶ 27, 122 P.3d 6, 14 (App. 2005).

acts to mitigate the loss. The decrease in patronage was directly tied to a damaged facility. Aztar essentially asserts that the collapse of the expansion project, had it been completed, had the same impact on its facilities as the parking garage in the ice cream store hypothetical, a reduction in patronage. Aztar mitigates its loss, the argument goes, and complies with ¶ 12 by repairing the collapsed parking structure. The fact that its other facilities remained operational does not control the outcome nor mean that its "business" has not been interrupted.

vii.

¶35 To conclude on this point, for the reasons set forth above, we hold that the trial court erred in determining as a matter of law that Aztar's claims could not fall within the business interruption coverage provided in Part II, ¶ 1 of the Policy because the hotel and casino still had the same operational capacity. That clause is not only "reasonably susceptible" to a construction not limited solely to "operations," but is best understood by the layman in the fashion described herein. Because the trial court based its entry of summary judgment on a flawed definition of "interruption of business," the ruling cannot stand on that theory. We can, of course, affirm an entry of summary judgment for a reason other than that relied upon by the trial judge.

Ness v. W. Sec. Life Ins. Co., 174 Ariz. 497, 502, 851 P.2d 122, 127 (App. 1992) ("We may uphold a judgment on grounds different from those cited by the trial court."). Such is the case here. While the clause at issue *can* be construed broadly enough to include a decreased patronage claim in some circumstances (i.e., the ice cream store example we have given), that does not mean that any and all decreased patronage claims are included or that Aztar's is one that is. Courts must consider the nature of the loss in determining whether the claim falls within the definition of business.

¶36 In the ice cream store example, we assumed the loss was caused by damage to property both covered by the policy and functioning at the time of the fire. Here, Aztar seeks coverage for two types of loss. First, Aztar requests coverage for contingent business interruption loss – a decrease in *anticipated* patronage from new customers who would have stayed at or visited the expansion and then patronized the hotel and casino. Aztar asserts the contingent business interruption loss occurred during the approximate seven-month delay in the opening of the expansion. Second, Aztar claims coverage for loss from decrease in *existing* patronage by those who stayed away from the Tropicana due to psychological factors (i.e. fears because of the loss of life and collapse of the expansion). We now address

whether Aztar's losses are equivalent to the functioning parking garage that was a covered loss in our hypothetical.

b. Contingent Business Interruption Loss

¶37 As noted, Aztar seeks to recover loss from decreased anticipated patronage under the Policy's contingent business interruption provision. Aztar refers to this loss as a contingent business interruption loss, which was caused by unrealized anticipated profits at the hotel and casino by new customers who would have visited the expansion and then patronized the existing Tropicana, had the expansion been completed. Coverage for this type of loss turns on the meaning of the contingent business interruption provision. Part II, ¶ 2.f of the Policy states:

> *Loss resulting from the necessary interruption of business* conducted by the Insured, and the necessary extra expense incurred by the Insured, subject to a sublimit of liability of $50,000,000 per occurrence, *caused by damage* or destruction by a peril not excluded herein occurring during the term of this policy to real or personal property of the Insured's suppliers or customers or *of contributing* or recipient *properties of the Insured.*

(Emphasis added.)

¶38 Aztar argues ¶ 2.f provides coverage for decreased patronage because the expansion was a "contributing propert[y]" that added customers to the casino and hotel. The Excess Insurers argue that Aztar cites no case holding that "property

damage[] in the course of construction and prior to opening triggers contingent [business interruption] coverage for anticipated future contributions of the insured property." The trial court granted the Excess Insurers' motion for the reason that there was no business interruption and because the expansion was not "contributing" property. We find merit in the trial court's latter reason for denying contingent business interruption coverage.

¶39 As we have discussed previously, we look at an insurance contract from the perspective of an average layman and give words their common and ordinary meaning. *Sparks*, 132 Ariz. at 537, 647 P.2d at 1135; *Chandler Med. Bldg. Partners v. Chandler Dental Group*, 175 Ariz. 273, 277, 855 P.2d 787, 791 (App. 1993). The Oxford English Dictionary defines "contribute" as "to have a part or share in producing" and "[t]o give or furnish along with others towards bringing about a result." The Oxford English Dictionary 848-49 (2nd ed. 2000). Merriam Webster's Collegiate Dictionary says "contribute" means "to play a significant part in bringing about an end or result." Merriam Webster's Collegiate Dictionary 252 (10th ed. 2001). In the Policy, "contributing" is an adjective modifying and defining the "properties" in relation to the Insured's business. In this context, the ordinary meaning of "contributing property" is that

the property is *presently* in operation or production and adding to the Insured's business when the loss occurs.

¶40 Here, the expansion collapsed before it was completed and opened for business. Returning to our earlier analogy, the collapsed expansion in this case was never completed and was not "contributing" as was the parking facility in our ice cream store example. As the Excess Insurers argue, there was no "property" that was contributing to the Tropicana. Aztar presented evidence that, before the collapse, the expansion resulted in improved bookings and additional customers seeking "comps" when the expansion would open. However, "contributing property" does not mean the prospect that the property will be complete and contribute to the Insured's business in the future. In such a case, the property itself is not contributing; only the *prospect* of its successful completion is contributing. If the rule were otherwise, fanciful and speculative announcements of future business enhancements used to generate consumer interest could be covered as "contributing property," and we do not view the ordinary meaning of the term so broadly. Accordingly, the trial court did not err in granting summary judgment on the issue of contingent business interruption coverage under Part II, ¶ 2.f.

¶41 Aztar also argues that recovery for this same decrease in anticipated patronage for contingent business interruption

loss is permitted under Part II, ¶ 1, the primary main business interruption clause. This argument is misplaced. Part II, ¶ 1 is a broad provision relating to business interruption loss in general, whereas Part II, ¶ 2.f is a more specific provision extending coverage to business interruption loss, with a $50,000,000 sublimit of liability, caused by damage to the Insured's contributing property. In describing the coverage in ¶ 2.f, as contrasted with ¶ 1, the policy states it "is *extended* to cover" the circumstances in Part II, ¶ 2.f. (Emphasis added.) As we discuss in more detail below, *infra* ¶¶ 46-48, this language directs that the coverage provided in Part II, ¶ 2.f would be for circumstances in addition to, but not covered in, Part II, ¶ 1. Aztar's construction turns that language on its head. Under Aztar's construction, Part II, ¶ 1 would provide coverage when the more specific conditions set forth in Part II, ¶ 2.f, intended to "extend" coverage, act to *preclude* coverage. Such a construction puts Part II, ¶ 1 and Part II ¶ 2.f at odds with each other. When interpreting an insurance contract, we have a duty to "harmonize all parts of the contract . . . by a reasonable interpretation in view of the entire instrument." *Brisco v. Meritplan Ins. Co.*, 132 Ariz. 72, 75, 643 P.2d 1042, 1045 (App. 1982); *see also LeBaron v. Crismon*, 100 Ariz. 206, 209, 412 P.2d 705, 707 (1966). Importantly, the "specific provisions of a contract qualify the meaning of a

general provision." *Technical Equities Corp. v. Coachman Real Estate Inv. Corp.*, 145 Ariz. 305, 306, 701 P.2d 13, 14 (App. 1985); *see also Norman v. Recreation Ctrs. of Sun City, Inc.*, 156 Ariz. 425, 428, 752 P.2d 514, 517 (App. 1988). Consequently, Aztar cannot recover its asserted losses for a decrease in anticipated patronage under Part II, ¶ 1 because Part II, ¶ 2 is more specific and does not provide coverage.

c. Loss From Decreased Existing Patronage Due to Psychological Factors

¶42 Aztar seeks coverage under Part II, ¶ 1 for its loss from an asserted decrease in existing patronage at the Tropicana due to psychological factors. The Excess Insurers argue the expansion must be covered property under the Policy for this claim to trigger coverage. Aztar argues that there is no such requirement. The trial court did not directly reach this issue. Rather it found an issue of fact existed as to whether the expansion was covered property on the date of the collapse. This factual finding was erroneous.[8]

[8] Aztar did not raise the covered property issue on appeal. The Excess Insurers did not file a cross-appeal but raised the covered property issue in their answering brief. ARCAP 13(b)(3) provides that "[t]he brief of the appellee may, without need for a cross-appeal, include in the statement of issues presented for review and in the argument any issue properly presented in the superior court." The Excess Insurers properly presented the covered property issue in their cross-motion for summary judgment. Therefore, we may consider the issue on appeal. Our resolution of the case is proper because

i.

¶43 The trial court's factual finding (that there was a question of fact as to whether the expansion was covered) implies a ruling on the law that business interruption coverage under Part II, ¶ 1 is available only if damage to or destruction of *covered* property causes the interruption of business. Though we find error in the factual finding, we agree with the implicit ruling that the damaged property must be covered to trigger the policy provision.

¶44 Part II, ¶ 1 of the Policy provides business interruption coverage for "loss . . . caused by damage to or destruction of all real or personal property, manuscripts and watercraft, by the peril(s) insured against, during the term of this policy, on premises situate per the Territorial Limits in this policy." Aztar argues that the language of the business interruption provision does not require damage to or destruction of "covered property"; it instead requires damage to "all real or personal property." The Excess Insurers argued to the trial court that "real or personal property" refers to the property covered under Part I, ¶ 1 of the Policy. Part I, ¶ 1 states:

> **Property Covered –** This policy covers:

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we have not "enlarge[d] the rights of the appellee or [] lessen[ed] the rights of the appellant." ARCAP 13(b)(3).

> a. The interest of the Insured for all real and personal property including, manuscripts, signs, pools, fences, retaining walls, underground tanks and piping, trees considered part of landscaping not excluded as standing timber, shrubs and landscaping owned in whole or in part by the Insured.

¶45 As before, we begin by looking at the language of the policy provisions at issue from the standpoint of an average layman, giving the words their ordinary and common meaning. *Sparks*, 132 Ariz. at 537, 647 P.2d at 1135; *Chandler Med. Bldg. Partners*, 175 Ariz. at 277, 855 P.2d at 791. We interpret a contract "so that every part is given effect, and each section of an agreement must be read in relation to each other to bring harmony, if possible, between all parts of the writing." *Chandler Med. Bldg. Partners*, 175 Ariz. at 277, 855 P.2d at 791. Our reading of one provision of a contract must not render a related provision meaningless. *Tucker v. Byler*, 27 Ariz. App. 704, 707, 558 P.2d 732, 735 (1976).

¶46 Although Part II, ¶ 1 does not explicitly state the property must be "covered," applying these standard rules of contract interpretation, we are persuaded that "all real or personal property" is shorthand for covered property under Part I because a contrary interpretation would result in an absurd contract and make the extensions of coverage in Part II, ¶ 2 meaningless. As noted earlier, Part II, ¶ 2 says "[t]his policy

is extended to cover" and then identifies eight extensions of coverage. The plain meaning of "extend" is "to increase the scope, meaning, or application of." Merriam-Webster's Collegiate Dictionary 410 (10th ed. 2001). Thus, the extensions of coverage provide additional coverage for situations that are not covered under Part II, ¶ 1.

¶47 Aztar's interpretation eliminates the distinction between Part II, ¶ 1 and Part II, ¶ 2. For example, Part II, ¶ 2.f covers "damage or destruction . . . to real or personal property of the Insured's suppliers or customers." Under Aztar's interpretation of the Policy, Part II, ¶ 1 would provide business interruption coverage up to the policy limit caused by destruction of a non-covered property in another state that the Tropicana does not depend on for supplies or customers. However, if the Tropicana heavily depended on this same property for supplies or customers, then Aztar would only recover up to the $50 million limit under ¶ 2.f. Aztar's interpretation makes ¶ 2.f and the remaining extensions of coverage narrow limitations to coverage instead of extensions of coverage. This conflicts with the plain meaning of "extend."

¶48 Coverage for interruption of business because of damage to or destruction of any real or personal property located anywhere in the United States is an absurd and unreasonable interpretation of the contract. Numerous examples

of the overbreadth of such an interpretation could be given.[9] "It is the duty of the court to adopt a construction of a contract which will harmonize all of its parts, and apparently conflicting parts must be reconciled, if possible, by any reasonable interpretation." *U.S. Insulation, Inc. v. Hilro Constr. Co.,* 146 Ariz. 250, 259, 705 P.2d 490, 499 (App. 1985). The only non-absurd reading of the contract is that "all real or personal property" refers back to the policy provisions including Part I, ¶ 1,[10] defining the property that is covered.[11] Thus, we agree with the implicit ruling of the trial court.

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[9] For example, suppose a fire destroys the floor of the New York Stock Exchange and forces a significant restriction on trading for weeks. This causes chaos among businesses and individual consumers who can no longer easily access money they have invested in the market. In turn, the Tropicana experiences a decrease in patronage by these consumers. Under Aztar's reasoning, the Policy covers its business interruption claim for loss caused by destruction of the New York Stock Exchange.

[10] Because Part I as a whole defines covered property, every provision of Part I must be considered in determining coverage issues under Part II, ¶ 1.

[11] Aztar argues Part II, ¶ 1 cannot require covered property because it would make ¶¶ 2.i and 2.j of the general conditions redundant. Those provisions are as follows:

> i. Loss directly caused by and resulting from dampness of atmosphere, dryness of atmosphere, extremes or changes of temperature (but this exclusion shall not apply to the breakage, bursting, or leakage of pipes and water systems due to freezing), shrinkage, evaporation, loss of weight, rust or corrosion, contamination, or change in flavor, color, texture, or finish, unless

ii.

¶49 The trial court erred when it found a factual issue existed regarding whether the expansion was covered property. The Policy endorsement states:

> **ATLANTIC CITY, NEW JERSEY – EXPANSION PROJECT ENDORSEMENT**
>
> It is agreed that Aztar/Tropicana – Atlantic City, New Jersey New Expansion Project (27 story, multi-use: retail, dining, entertainment, meeting rooms, hotel and garage), estimated values of $250,000,000, will be endorsed onto this policy, effective 01 April 2004, without any additional premium.

¶50 Aztar argued to the trial court that the expansion was covered property throughout its construction and that April 1, 2004 refers to the date the estimated value of the expansion

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> such loss is caused by or results from physical damage by a peril not otherwise excluded;
>
> (1) To the property covered,
>
> (2) To premises, or
>
> (3) To conveyances containing such property.
>
> j. Loss or damage by any peril otherwise insured herein to offshore property as herein defined, except as situated in or around Caruthersville, Missouri, and Evansville, Indiana.

We fail to see these provisions as being inconsistent with the analysis set forth above.

would be added to the Policy. Aztar also argued that extrinsic evidence shows it purchased coverage for loss caused by the expansion. In particular, Aztar pointed to deposition testimony that its risk manager and insurance broker intended the expansion to be covered under the Policy.

¶51 When presented with extrinsic evidence, as is the case here, the "judge first considers the offered evidence and, if he or she finds that the contract language is 'reasonably susceptible' to the interpretation asserted by its proponent, the evidence is admissible to determine the meaning intended by the parties." *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 154, 854 P.2d 1134, 1140 (1993). If "the asserted interpretation is unreasonable or the offered evidence is not persuasive," then the judge bars admission of the extrinsic evidence. *Id.* at 155, 854 P.2d at 1141.

¶52 We disagree with Aztar's interpretation of the endorsement. The language clearly indicates the expansion would be endorsed onto the Policy – and consequently become covered property – on April 1, 2004. What logically follows from this endorsement is that it was *not* covered property before April 1, 2004.[12] Pursuant to *Taylor*, the parol evidence rule bars

[12] We are aware that the provisions of the Policy pertaining to "property covered" include "[t]he interest of the Insured for all real and personal property . . . ." However, the specific language of the endorsement directly addressing,

admission of extrinsic evidence that varies or contradicts the terms of a written contract. *Id.* at 154, 854 P.2d at 1140. Here, Aztar's extrinsic evidence violates the parol evidence rule because it contradicts the plain meaning of the endorsement. The language is not "reasonably susceptible" to the interpretation Aztar proposes. Therefore, this evidence is inadmissible.

¶53 Even if the endorsement language was unclear, Aztar acknowledged that the expansion was not covered property in a May 2005 email. In the email, Aztar's broker stated it should have requested a premium refund from Lexington because Lexington had no exposure for the expansion from April 1, 2004 until the expansion was actually endorsed onto the policy on November 23, 2004. No reasonable jury could conclude that "effective 01 April 2004" meant the expansion was covered under the Policy some six months earlier on October 30, 2003. Therefore, we reverse the trial court's ruling on this issue.

¶54 Because the expansion was not covered property on the date of the collapse, Aztar's claim based on a decrease in existing patronage under Part II, ¶ 1 is not a covered loss. Consequently, the trial court did not err in granting summary judgment in favor of the Excess Insurers on this claim under the

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and providing for a coverage date of April 1, 2004, effectively clarifies that the expansion is not included until that time.

main business interruption provision. *Ness*, 174 Ariz. at 502, 851 P.2d at 127 (affirming summary judgment on grounds different than those referenced by the trial court).

d. Civil Authority, Ingress/Egress, and Extended Period of Indemnity Provisions

¶55 Part II, ¶¶ 2.c and 2.d of the Policy provide thirty days of extended coverage for loss sustained when damage to property within five miles of the insured's property causes (1) impaired access to or egress from insured's property or (2) an order by civil authority that impairs access to the insured's property. In granting summary judgment in favor of the Excess Insurers, the trial court determined ¶¶ 2.c and 2.d are separate extensions of coverage from Part II, ¶ 2.g, which provides 365 days of extended indemnity coverage for restoration of the insured's business. Aztar argues the trial court erred because ¶ 2.g applies to civil authority and ingress/egress claims. More specifically, Aztar argues civil authority and ingress/egress claims fall within ¶ 2.g because it is "the date on which the liability of this Company for loss resulting from interruption of business would terminate if this endorsement had not been attached to this policy."

¶56 Aztar's interpretation would render the thirty-day indemnity limit in ¶¶ 2.c and 2.d meaningless because there would be no thirty-day limit if ¶ 2.g applied. If we adopted

Aztar's interpretation, the separately stated time periods would become 395 days, rather than 30. It is a cardinal rule of contract interpretation that we do not construe one term of a contract to essentially render meaningless another term. *Scholten v. Blackhawk Partners,* 184 Ariz. 326, 329, 909 P.2d 393, 396 (App. 1995) ("[A] contract should be construed to give effect to all its provisions and to prevent any of the provisions from being rendered meaningless."); *Norman,* 156 Ariz. at 428, 752 P.2d at 517 ("[W]e do not construe one provision in a contract so as to render another provision meaningless."). The 365-day extended indemnity period under ¶ 2.g does not apply to civil authority and ingress/egress claims; the 30-day limit applies.

¶57 Although Aztar relies on *Fountain Powerboat Industries, Inc. v. Reliance Insurance Co.*, 119 F. Supp. 2d 552 (E.D.N.C. 2000), that case is inapposite to the language in Aztar's Policy. In *Fountain Powerboat*, the court held the one-year extended indemnity provision covered loss sustained from impaired ingress and egress. *Id.* at 557-58. Unlike Aztar's policy that contains a maximum indemnity period for impaired access and civil authority closures, the policy at issue in *Fountain Powerboat* covered loss for the "period of time" access was impaired. *Id.* at 556. Here, we decline to use ¶ 2.g to expand the thirty-day maximum indemnity period for civil

authority and ingress/egress claims. Summary judgment in favor of the Excess Insurers was appropriate.

2. Attorneys' Fees

¶58 Aztar argues the Certain Excess Insurers' applications for attorneys' fees were untimely under ARCP 54(g)(2) because the Certain Excess Insurers failed to file them within twenty days. Aztar also contends that the trial court applied an incorrect standard when it required Aztar to demonstrate that the Certain Excess Insurers' untimely applications prejudiced Aztar. Aztar further claims that under ARCP 54(g), the Certain Excess Insurers were required to request an extension prior to the twenty-day filing deadline.

¶59 The Certain Excess Insurers admit their fee applications were filed "approximately one and one-half months after the court's minute entry" but argue the court had discretion to grant them. The Certain Excess Insurers further contend that the court's ruling "concurrently extended the time for [Certain Excess] Insurers to file their application [and] overruled Aztar's objections as to the timeliness of the application."

¶60 Interpretation of a rule of civil procedure is subject to *de novo* review. *King v. Titsworth*, 221 Ariz. 597, 598, ¶ 8, 212 P.3d 935, 936 (App. 2009). ARCP 54(g)(2) provides:

> Time of Determination. When attorneys' fees are claimed, the determination as to the claimed attorneys' fees shall be made after a decision on the merits of the cause. The motion for attorneys' fees *shall be filed within 20 days* from the clerk's mailing of a decision on the merits of the cause, *unless extended by the trial court*.

(Emphasis added.) ARCP 54(g)(2) gives the trial court discretion to extend the time for requesting attorneys' fees, and the party seeking the fees need not request an extension prior to untimely filing its claim. *Nat'l Broker Assoc., Inc. v. Marlyn Nutraceuticals, Inc.*, 211 Ariz. 210, 218, ¶ 38, 119 P.3d 477, 485 (App. 2005). In *National Broker Associates,* we addressed an objection to a claim for attorneys' fees filed after the twenty-day limit. *Id.* We concluded that under ARCP 54(g), "the trial court has the discretion to extend the time for filing the claims." *Id.* Here, the trial court properly granted attorneys' fees in favor of the Certain Excess Insurers.

¶61 Aztar points us to *Allstate Insurance Co. v. Universal Underwriters, Inc.*, 199 Ariz. 261, 17 P.3d 106 (App. 2000). There, seemingly in conflict with our subsequent ruling in *National Broker Associates*, we stated that when the parties seeking fees did not timely obtain leave to file the motion after the sixty-day filing period, the request for attorneys' fees was untimely. *Id*. at 266, ¶ 16, 17 P.3d at 111. Although we decided that the fee request was untimely, we reversed the

award of fees based on a determination that the court no longer had jurisdiction. *Id*. at 265-66, ¶¶ 14-15, 17 P.3d at 110-11. Further, there is no indication in *Universal Underwriters* that the trial court was expressly aware of the untimely filing and determined that it was appropriate to award fees in spite of it. In the matter before us, the trial court expressly found:

> [Certain Excess Insurers] did not submit their fee application within 20 days of the mailing of the decision on the merits. However, Aztar has failed to establish how [the Certain Excess Insurers'] failure in this regard prejudiced Aztar in any way or delayed in any way the entry of judgment in this matter. Thus, the Court is of the opinion that under the facts and circumstances of this case, [Certain Excess Insurers'] failure to comply with Rule 54(g), Ariz.R.Civ.P., standing alone, does not warrant the denial of their fee application.

Therefore, we consider *National Broker Associates* the controlling authority.[13]

¶62 We recognize that some federal courts construe the language of Federal Rule of Civil Procedure ("FRCP")

[13] Our analysis in this regard is limited to Rule 54(g)(2). We do not render a standard of general applicability that impacts our other decisions as to the timeliness of filings under different court rules. *E.g.*, *Maule v. Superior Court*, 142 Ariz. 512, 515, 690 P.2d 813, 816 (App. 1984) (holding that under Arizona Rule of Criminal Procedure 12.9, pertaining to the timeliness of a motion to remand a matter to the grand jury, "the trial court has no authority to grant an extension that is not made" within the 25 days provided in that rule).

54(d)(2)(B)(i),[14] the similar but not identical federal counterpart to ARCP 54(g), as requiring strict adherence to the filing deadline when no statute or court order provides a different deadline. *See, e.g.*, *Bender v. Freed*, 436 F.3d 747, 750 (7th Cir. 2006) (upholding denial of motion for fees as untimely); *IPXL Holdings, L.L.C. v. Amazon.com, Inc.*, 430 F.3d 1377, 1385-86 (Fed. Cir. 2005) (finding the district court does not have discretion to extend the fourteen-day filing deadline when the party seeking attorneys' fees did not request an extension pursuant to FRCP 6(b)). Here, under ARCP 54(g), where no prejudice exists, we believe that *National Broker Associates* provides the better rule in determining that it is not an abuse of discretion for the trial court to grant untimely applications for attorneys' fees.

Conclusion

¶63 For the reasons stated above, we affirm the trial court's denial of Aztar's cross-motion for partial summary judgment and grant of partial summary judgment in favor of the Excess Insurers. We also affirm the trial court's award of attorneys' fees and costs. In the exercise of our discretion,

[14] "Unless a statute or a court order provides otherwise, the motion must . . . be filed no later than 14 days after the entry of judgment." Fed. R. Civ. Proc. 54(d)(2)(B)(i).

we decline the Excess Insurers' request for attorneys' fees on appeal.

/s/
_____
DANIEL A. BARKER, Judge

CONCURRING:

/s/
_____
MAURICE PORTLEY, Presiding Judge

/s/
_____
PETER B. SWANN, Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
June 29, 2010
Lyle W. Cayce
Clerk

No. 09-60661

WMS INDUSTRIES, INC.,

Plaintiff - Appellant,

v.

FEDERAL INSURANCE CO.,

Defendant - Appellee

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 1:06-CV-977

Before JONES, Chief Judge, and KING and HAYNES, Circuit Judges.

PER CURIAM:[*]

WMS Industries, Inc., appeals a final judgment entered in favor of Federal Insurance Co. following a bench trial. This appeal centers on a dispute over the interpretation of a business interruption insurance policy under Mississippi law. The parties disagree over the correct interpretation of multiple provisions of the policy. We AFFIRM the district court's resolution of these disputes.

[*] Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

I. Facts

WMS manufactures electronic slot machines and provides different options for continuing services for those slot machines. Casinos can lease from WMS (1) stand-alone slot machines, which operate individually; (2) "local-area progressive" ("LAP") slot machines, which are networked within a casino; or (3) "wide-area progressive" ("WAP") slot machines, which are networked across multiple casinos and centrally monitored by WMS. Each class of WMS's WAP machines participates in a single progressive jackpot, with WMS taking all wagers from a central monitoring location and paying out from that location. In Mississippi, WMS operated its WAP machines from a central facility known as "Premises 24" in Gulfport, which was connected to the actual slot machines at participating casinos by T-1 data lines provided by a third party.

On August 29, 2005, Hurricane Katrina struck the Mississippi Gulf Coast. Among many other effects, the hurricane caused extensive damage to the casino industry in Gulfport, Mississippi, including WMS's Premises 24 WAP monitoring facility. Premises 24 suffered extensive physical damage and lost utility service in the storm.

WMS obtained permission from Mississippi authorities to temporarily move its WAP monitoring for Mississippi to a different facility in Reno, Nevada, and succeeded in doing so on September 11, 2005. WMS repaired the physical damage to Premises 24 on November 14, 2005, and ultimately moved its WAP operations back to Premises 24 on December 2, 2005.

WMS was covered by Federal's policy for $100 million in losses under the "Business Income and Extra Expenses" ("BI/EE") coverage, but only $1 million under the "Dependent Business Premises" coverage. Concluding that the bulk of WMS's losses resulted from a loss of income because WMS's casino customers did not reopen for some time rather than from damage to WMS's own premises, Federal ultimately paid policy limits under the Dependent Business Premises

coverage. WMS's losses, however, far exceeded these policy limits. As a result, WMS contended that losses attributable to the casinos' closures were also covered under the much higher limit BI/EE coverage. Federal disagreed, and this lawsuit resulted.[1]

II. Standard of Review

"The interpretation of an insurance policy, like any contract, is a legal question reviewed *de novo* . . . ." *Leonard v. Nationwide Mut. Ins. Co.*, 499 F.3d 419, 428 (5th Cir. 2007) (citing *Welborn v. State Farm Mut. Auto. Ins. Co.*, 480 F.3d 685, 687 (5th Cir. 2007) (per curiam)). After a bench trial, "[f]actual findings are upheld on appeal unless clearly erroneous." *Leonard*, 499 F.3d at 429 (citing *Provident Life & Accident Ins. Co. v. Sharpless*, 364 F.3d 634, 641 (5th Cir. 2004)).

III. Discussion

The primary dispute[2] between the parties dispute boils down to the question of whether, for BI/EE coverage, this policy requires that the property damage at WMS's own premises cause the loss (Federal's contention) or instead that there must be property damage at WMS's own facility as a "trigger" – but then the "scope" of the coverage is for losses caused to WMS by property damage anywhere (*i.e.*, the affected casino customers) (WMS's contention).

The policy provides in part –

---

[1] Federal refused to make any payments under the BI/EE coverage. The district court found some losses due to damage at Premises 24 and ordered a small amount of payments under this coverage. However, the bulk of WMS's claimed losses remained unsatisfied.

[2] We find no reversible error in the district court's resolution of the other disputes between the parties and, for substantially the same reasons given by the district court, affirm those decisions as well.

BI/EE Coverage

> The following Premises Coverages apply only at those premises for which a Limit Of Insurance applicable to such coverages is shown in the Declarations.
>
> Except as otherwise provided, direct physical loss or damage must:
>
> - be caused by or result from a **covered peril**; and
> - be at, or within 1,000 feet of, the premises, other than a **dependent business premises**, shown in the Declarations.
>
> . . .
>
> This actual or potential impairment of **operations** must be caused by or result from direct physical loss or damage by a **covered peril** to **property**, unless otherwise stated.
>
> This Premises Coverage applies only at those premises:
>
> - where you incur a **business income** loss or **extra expense**; and
> - for which a Limit Of Insurance for Business Income With Extra Expense is shown in the Declarations.

Dependent Business Premises

> This actual or potential impairment of **operations** must be caused by or result from direct physical loss or damage by a **covered peril** to **property** or **personal property of a dependent business premises** at a **dependent business premises**.[3]

"Because this is a diversity case involving a Mississippi [insurance] contract, we apply Mississippi contract law to interpret the policy." *Catlin Syndicate Ltd. v. Imperial Palace of Miss., Inc.*, 600 F.3d 511, 513 (5th Cir. 2010) (citing *Ideal Mut. Ins. Co. v. Last Days Evangelical Ass'n*, 783 F.2d 1234, 1240 (5th Cir. 1986)). Mississippi law provides a familiar standard for interpreting insurance policies:

[3] Boldface in the text of these provisions is in the original policy and indicates a defined term.

> [I]f a contract is clear and unambiguous, then it must be interpreted as written. A policy must be considered as a whole, with all relevant clauses together. If a contract contains ambiguous or unclear language, then ambiguities must be resolved in favor of the non-drafting party. Ambiguities exist when a policy can be logically interpreted in two or more ways, where one logical interpretation provides for coverage. However, ambiguities do not exist simply because two parties disagree over the interpretation of a policy. Exclusions and limitations on coverage are also construed in favor of the insured. Language in exclusionary clauses must be clear and unmistakable, as those clauses are strictly interpreted. Nevertheless, a court must refrain from altering or changing a policy where terms are unambiguous, despite resulting hardship on the insured.

U.S. Fid. & Guar. Co. of Miss. v. Martin, 998 So. 2d 956, 963 (Miss. 2008) (citations and quotation marks omitted). Neither side contends that the policy is ambiguous, though both advance contrary interpretations of it.

We conclude that the BI/EE coverage under this policy unambiguously requires that the losses in question flow from the damage to one of the listed WMS premises, *i.e.*, Premises 24, and not just to property damage anywhere. Accordingly, the losses caused to WMS by the closure of its casino customers' facilities for an extended time are not covered under this portion of the policy (though, of course, they are covered by the Dependent Business Premises coverage). As a result, the district court did not err in denying relief for these amounts in excess of the policy limits of the Dependent Business Premises coverage.

AFFIRMED.

Back

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

BRAY & GILLESPIE MANAGEMENT, LLC, et al.,

Plaintiffs,

v. **Case No.: 6:07-cv-0222-Orl-35KRS**

LEXINGTON INSURANCE COMPANY,

Defendant.
_____/

ORDER

An evidentiary hearing was held in this case on Thursday, December 3, 2009, at which the Court heard the parties' oral arguments on (i) Defendant's pending Motion for Sanctions (Dkt. 526), filed on May 22, 2009, (ii) two Reports and Recommendations (Dkts. 576, 578), issued by the United States Magistrate Judge on August 3, 2009, recommending that Defendant's Motion for Sanctions be granted and a series of sanctions be entered against the Plaintiff, and (iii) a litany of supplements and responses filed in support or objection to the Motion and the Reports and Recommendations. (Dkts. 529, 530, 532, 569, 575, 586, 587, 602-04, 606-08, 621, 624-27, 630, 638).

I. Standard of Review

After conducting a careful and complete review of the findings and recommendations,

a district judge may accept, reject or modify the magistrate judge's report and recommendation. 28 U.S.C. § 636(b)(1); Williams v. Wainwright, 681 F.2d 732, 732 (11th Cir. 1982), *cert. denied,* 459 U.S. 1112 (1983). A district judge "shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C). This requires that the district judge "give fresh consideration to those issues to which specific objection has been made by a party." Jeffrey S. v. State Bd. of Educ., 896 F.2d 507, 512 (11th Cir.1990) (quoting H.R. 1609, 94th Cong. § 2 (1976)). Even in the absence of specific objections, there is no requirement that a district judge review factual findings *de novo,* Garvey v. Vaughn, 993 F.2d 776, 779 n.9 (11th Cir. 1993), and the court may accept, reject or modify, in whole or in part, the findings and recommendations. 28 U.S.C. § 636(b)(1)(C). The district judge reviews legal conclusions *de novo,* even in the absence of an objection. See Cooper-Houston v. Southern Ry., 37 F.3d 603, 604 (11th Cir. 1994).

Federal Rule of Civil Procedure 37 allows the imposition of sanctions against a party for failure to make proper disclosure in discovery. Rule 37(b),(c) provide, in relevant part:

> (b) Failure to Comply with a Court Order.
>
> . . . .
>
> (2) Sanctions in the District Where the Action Is Pending.
>
> (A) For Not Obeying a Discovery Order. If a party or a party's officer, director, or managing agent--or a witness designated under Rule 30(b)(6) or 31(a)(4)--fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:
>
> (I) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;
>
> (ii) prohibiting the disobedient party from supporting or opposing

> designated claims or defenses, or from introducing designated matters in evidence;
>
> (iii) striking pleadings in whole or in part;
>
> (iv) staying further proceedings until the order is obeyed;
>
> (v) dismissing the action or proceeding in whole or in part;
>
> (vi) rendering a default judgment against the disobedient party; or
>
> (vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.
>
> . . . .
>
> (C) Payment of Expenses. Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.
>
> (c) Failure to Disclose, to Supplement an Earlier Response, or to Admit.
>
> (1) Failure to Disclose or Supplement. If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:
>
> (A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;
>
> (B) may inform the jury of the party's failure; and
>
> (C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

Fed. R. Civ. P. 37(b),(c).

In the Eleventh Circuit, pursuant to Rule 37, the district courts hold broad discretion to impose sanctions against litigants or their counsel, to include the imposition of monetary sanctions and, when appropriate, dismissal of a claim or responsive pleading. BankAtlantic

v. Blythe Eastman Paine Webber, Inc., 12 F.3d 1045, 1048-49 (11th Cir. 1994). A district court's act of imposing sanctions pursuant to Rule 37 implicates the Due Process Clause of the Fifth Amendment, and so, to ensure a sanction of fees is "just," the Record must reflect that the sanctioned party was previously on notice of the necessity to produce the discovery in question. Id. at 1050. A finding of bad faith or willfulness on the part of the sanctioned party is necessary only when a court imposes the most severe sanction of default or dismissal. Id. at 1049. When contemplating dismissal, a district court must consider "whether a less drastic but equally effective remedy could have been fashioned." Aztec Steel Co. v. Florida Steel Corp., 691 F.2d 480, 481 (11th Cir. 1982). Dismissal of a plaintiff's complaint is considered an extreme remedy and should not be imposed if lesser sanctions will suffice. Navarro v. Cohen, 856 F.2d 141, 142 (11th Cir. 1988). "When a party demonstrates a flagrant disregard for the court and the discovery process, however, dismissal is not an abuse of discretion." Aztec Steel Co., 691 F.2d at 481. Finally, Rule 37 is designed to protect a court's institutional values. Id. at 482. "Rule 37 sanctions are imposed not only to prevent unfair prejudice to the litigants but also to insure the integrity of the discovery process," id, and thus the court is encouraged to consider whether the sanctioned party's conduct would cause "'other parties to . . . feel freer than . . . Rule 37 contemplates they should feel to flout other discovery orders of other District Courts.'" Id. (quoting National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643 (1976)).

II. Analysis

A. Dispositive Sanction

Defendant's pending Motion for Sanctions predominantly concerns the production of

records or “folios” of each guest's stay at Plaintiff’s Treasure Island Resort Property. The “Treasure Island room folios” are essentially compilations of data from various points of sale in and around the Property documenting a guest’s stay and use of the hotel facilities. They can be used to determine, inter alia, whether a room was rented to a guest in the normal course of business at the Treasure Island Resort Property or whether the room was used to house personnel in relation to post-hurricane repair efforts. It is undisputed that the Treasure Island Resort Property and surrounding area was hit successively by Hurricanes Charley, Frances, and Jeanne in 2004. The Plaintiff’s demand for recovery for business interruption losses allegedly caused by Hurricane Jeanne requires Plaintiff to prove that Treasure Island Resort was operating in the normal course of business after sustaining damage from Hurricane Frances in 2004. Defendant contends that normal business operations had largely ceased after the Treasure Island Resort was damaged by Hurricane Frances and that the majority of occupants at the Resort after Hurricane Frances were not transient guests in the normal course of business.

In this case, since at least August 2007, Defendant has made repeated requests to Plaintiff to produce all Treasure Island room folios at issue. (Dkt. 576 at 35). Since April 2008, the Court has issued three orders clearly and unambiguously compelling production of all room folios. Further, Plaintiff has had reason to know of the importance of the room folios to Defendant since the report of Defendant’s expert, Peter Foggarty, CPA, CFE, was disclosed to Plaintiff on or about March 30, 2009. The last extended period of fact discovery closed in this case on February 27, 2009. (Dkt. 327, ¶ 1; Dkt. 576 at 19). As of March 30, 2009, Plaintiff had produced certain Treasure Island room folios that suggested that most of the Treasure

Island rooms leased between Hurricane Frances and Hurricane Jeanne were leased to hurricane "responders," such as persons affiliated with the local power company or construction contractors, not to standard transient guests. Accordingly, using the room folios produced as of March 2009 for support, Defendant's expert opined that Plaintiff's allegations of business interruption losses stemming from Hurricane Jeanne are exaggerated. It was not until May 14, 2009, that Plaintiff, during the deposition of Defendant's expert, first disclosed the existence of certain Treasure Island room folios that might be used to contest the Defendant's expert's theory. Upon reviewing Defendant's expert report and noting discrepancies in the folio information and certain available spread sheets related to room revenue, Plaintiff claims it realized that additional folios had to have been generated. Plaintiff again undertook a search for folios and discovered hard copies of additional folios in boxes of files that had been sent to storage but that had never been searched.

Plaintiff's initial explanation for the disproportionate representation of hurricane responders among the initial batch of computer generated Treasure Island room folios produced in January 2009 was that room folios for all Treasure Island Resort guests were normally archived six months after the guest's stay as an automatic function of Plaintiff's computerized accounts management system and filing software, termed "IQ Ware," and that only certain room folio files had been preserved in hard copy. However, this did not fully explain why the responders' folios would be available and another guest's folio would not be not be available if the two stayed at the Resort in the same time period or why the responders' computer generated folios were available in disproportionately greater numbers. Plaintiff has subsequently learned that folios of guests whose room accounts were not paid in full at the

time of check out remained open and were never archived. Plaintiff has additionally learned that if a guest was staying at the Resort as part of a group, such as a construction crew with a single account, that guest's folio would remain open and not be archived unless the entire group account was paid in full at the time of check out.

In any event, IQ Ware's automatic archiving procedure, once disclosed, implicated issues of spoliation in light of Plaintiff's duty to preserve records and to cease and desist all non-retrievable archiving upon notice of suit or receipt of a preservation letter. With this concern in mind, prior to the Evidentiary Hearing, Plaintiff's most recent substitute counsel, with the assistance of Plaintiff's computer forensics expert, made a simple telephone call to the software provider and reviewed the IQ Ware computer software system used to capture and produce room folios for the Treasure Island Resort Property and learned two significant and incredible facts. First, Plaintiff, despite all previous demands and court orders for this discovery and despite being under threat of having its entire case dismissed and its counsel severely sanctioned, had never even consulted its software provider to attempt to retrieve the archived documents. Second, the archived files are likely retrievable with minimal effort and at minimal expense and could likely render all folios available for review for the relevant time period – some two years and four months after they were first requested for production by Defendant in discovery and some twenty months after Plaintiff was *first* ordered by the Court to search thoroughly for and disclose the folio files. Thus, on December 3, 2009, during the Evidentiary Hearing, Plaintiff for the first time disclosed the likely existence of additional Treasure Island room folios and asked that it be allowed, without sanction, again, to cure its abject failure to make complete review and production, claiming that the folios can likely be

produced if discovery is, now on the eve of trial, reopened and extended for another four to six week period.

Plaintiff's request is **DENIED**. Plaintiff has failed to provide a satisfactory reason for the lack of previous production. Defendant's demand for full production of all Treasure Island room folios at issue has been clear, unambiguous, and frequent. In addition, the Court has previously issued three equally clear and unambiguous orders compelling Plaintiff to produce, inter alia, the folios presently at issue. (See Dkt. 576 at 35-38 (summarizing Defendant's repeated requests for production and the Court's related orders, entered on April 11, 2008, June 25, 2008, and January 7, 2009)). Plaintiff has acted willfully and in bad faith in not producing timely all discovery available and related to the Treasure Island room folios, and, in so doing, Plaintiff has evidenced a pattern of inexcusable disregard for the authority of this Court and the larger civil discovery process. The fact that Plaintiff's newest counsel discovered with relative ease the existence of this failure and a readily available cure for the gap in discovery highlights Plaintiff's failure and the failure of its prior counsel in this regard. Therefore, the Court sustains the Magistrate Judge's finding that Plaintiff's failure to produce the demanded and court ordered discovery evidences a pattern of inexcusable disregard for the authority of this Court and the larger civil discovery process and warrants imposition of substantial ameliorative and punitive sanctions.

In order to craft an appropriate sanction, the Court has carefully considered the full panoply of options available to remedy Plaintiff's flagrant disregard of its discovery obligations and this Court's several orders. The Court is mindful that the sanction should not be overly harsh, but should be sufficient both to remedy the immediate prejudice suffered by the

Defendant and to serve as an example to other parties to "insure the integrity of the discovery process." Aztec Steel Co. v. Florida Steel Corp., 691 F.2d 480, 482 (11th Cir. 1982).

The Court first finds that dismissal of Plaintiff's entire Amended Complaint, as recommended by the Magistrate Judge, would be an excessive remedy. First, the Court finds unpersuasive Defendant's contention that Plaintiff's failure to produce the Treasure Island room folios prevented Defendant from interviewing persons who could describe the condition of the Resort and the room rented at the time of that person's stay and, thus, has unduly impeded Defendant's ability to defend against Plaintiff's claims concerning property damage to the Resort. Defendant admits that the individuals among the hurricane responders have been available to Defendant since the inception of the litigation, yet none have been interviewed, and admits that certain transient guests have been known since the early discovery in the case, yet only three have been interviewed and none have deposed pursuant to a notice or subpoena served by Defendant. Additionally, Defendant's appraisers have had access to the Property throughout the several hurricanes and photographs of the properties exist to support Defendant's defense in this regard. Second, to the degree that the Court has found deliberate misconduct, the conduct has only related to the production of folios for the Treasure Island Property. To speculate without any evidentiary support that Plaintiff's conduct in this area undermines the integrity of all discovery provided in the case is not appropriate.

The Court has also contemplated whether it is possible to allow Plaintiff's claim for business interruption losses allegedly caused to the Treasure Island Property by Hurricane Jeanne to move forward, under a sanction that Plaintiff not be allowed to rely on or to introduce any late produced Treasure Island room folios. In this proposed scenario, the

Defendant would be allowed to use the folios to proffer an advantageous fact that could not then be fully explored by Plaintiff for possible inconsistency or other weakness. This "fictional" presentation of evidence would undermine the integrity of the judicial process in a way that cannot be countenanced. This Court will not charge a jury to decide the business interruption loss claim without allowing the jury a full review of all material, probative, non-privileged evidence related to that claim.

Moreover, permitting Plaintiff to use the late produced Treasure Island folios in support of its claim for business interruption losses arising from Hurricane Jeanne would only reward it for its recalcitrance and punish the Defendant, which would be left to scramble to counter evidence newly produced on the eve of trial without reasonable explanation for the extraordinary delay. Delaying the trial to permit time to counter this evidence in an orderly fashion would penalize Defendant by increasing the litigation costs in this matter. Further, the Court must be mindful that Plaintiff, by its actions and omissions, has forced the Court to concern itself with whether the Plaintiff's conduct, if not appropriately sanctioned, would cause "'other parties to . . . feel freer than . . . Rule 37 contemplates they should feel to flout other discovery orders of other District Courts.'" Aztec Steel Co., 691 F.2d at 481 (quoting National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643 (1976)). To this point, if the only sanction ordered in such scenarios is an extension of the discovery period upon being "caught" in flagrant violation of Court orders demanding timely disclosure, such delays in compliance would be undeterred. Finally, the sanction of costs alone has been previously attempted and has failed in this case as an incentive to force proper compliance.

Thus, as the half-measure of allowing partial introduction of the room folios is

untenable, the delay in the trial and the attendant expense to the Defendant is no remedy, and cost-only sanctions have proven ineffective, the Court finds that the most appropriate remedy is to **DISMISS with prejudice** Plaintiff's claim for damages arising from or related to any alleged interruption of business at the Treasure Island Property caused by Hurricane Jeanne.

B. Fees and Costs

The Court next finds that the amount of $75,000.00 shall serve as a reasonable amount to reimburse Defendant for expenses reasonably incurred by Defendant in pursuit of its underlying Motion for Sanctions and the full production and use of all Treasure Island room folios and to sanction Plaintiff for its violations, even though the amount may not suffice to cover all reasonable expenses incurred by Defendant. The Court reasons that the award of fees and costs in the amount of $75,000.00, in conjunction with the striking of Plaintiff's claim against Defendant for damages arising from or related to any alleged interruption of business at the Treasure Island Property caused by Hurricane Jeanne, is a sufficient sanction for the conduct at issue.

Additionally, Plaintiff, at its expense, shall produce all remaining Treasure Island room folios or other related Treasure Island guest files not yet produced to Defendant during the course of this litigation. Plaintiff shall have up to and including January 23, 2010, to make the production.

III. Conclusion

Accordingly, for the reasons stated herein and on the Record at the December 3, 2009 Evidentiary Hearing, made upon contemplation of the parties' final oral arguments and after a careful, *de novo* review of the Record, including the record evidence admitted at the hearing

on Defendant's Motion for Sanctions, the Plaintiff's Objections to the Magistrate Judge's Reports and Recommendations, and all responses in support or objection thereto, it is hereby

ORDERED that those portions of the Magistrate Judge's Report and Recommendations (Dkts. 576, 578) not previously disposed of by Order dated November 16, 2009 (Dkt. 630), are **ADOPTED**, **CONFIRMED**, and **APPROVED in part** and Defendant's Motion for Sanctions (Dkt. 526) is **GRANTED in part**, as described in this Order. Specifically,

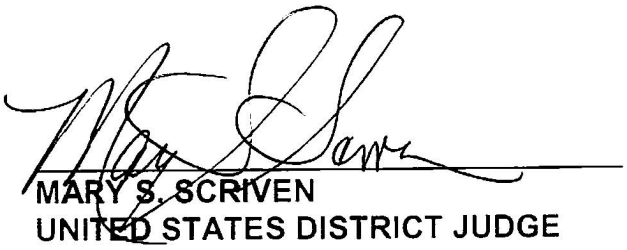
1. Plaintiff shall, within 14 days of the date of this Order, pay to Defendant the amount of $75,000.00, which shall serve as a sanction and as partial reimbursement to Defendant for expenses reasonably incurred by Defendant in pursuit of its underlying Motion for Sanctions and the full production and use of all Treasure Island room folios;

2. Plaintiff, at its expense, shall produce all remaining Treasure Island room folios or other related Treasure Island guest files (whether compiled as "folios" or kept in separate files) not yet produced to Defendant during the course of this litigation, including those that are "archived." Plaintiff shall have up to and including January 23, 2010, to make that production;

3. All claims against Defendant for damages arising from or related to any alleged interruption of business at the Treasure Island Property caused by Hurricane Jeanne are **DISMISSED with prejudice**; Plaintiff's claims for other damages, including for reimbursement of property damage allegedly caused to the Treasure Island Property by Hurricane Jeanne shall remain for trial unless dismissed by separate order of this Court; and

4. All claims against Defendant for damages alleged to have been incurred by Plaintiff for reasons other than Hurricane Jeanne's impact on the Treasure Island Property shall remain for trial unless dismissed by separate order from this Court.

DONE and ORDERED in Orlando, Florida, on this 5th day of January 2010.



MARY S. SCRIVEN
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel of Record

Filed 5/24/10 Amco Ins. co. v. Ninjin Japanese Restaurant CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

AMCO INSURANCE COMPANY, Plaintiff and Appellant, v. NINJIN JAPANESE RESTAURANT et al., Defendants and Respondents.	B216595 (Los Angeles County Super. Ct. No. SC097005)

APPEAL from a judgment of the Superior Court of Los Angeles County, Norman P. Tarle, Judge. Affirmed.

Gelman Law Group and Alexander M. Gelman for Plaintiff and Appellant.

Law Office of Priscilla Slocum, Priscilla Slocum; Early, Maslach & Rudnicki and James Grafton Randall for Defendants and Respondents.

INTRODUCTION

Plaintiff Amco Insurance Company (Amco) appeals from a summary judgment in favor of defendants Ninjin Japanese Restaurant and Eun Jean Lim (collectively Ninjin). We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In May 2003, Ninjin as lessee entered into a Standard Industrial Lease with Raymond Carriere (Carriere) as lessor for property in Santa Monica. Paragraph 8 covered insurance indemnity. Specifically, paragraph 8.1 provided: "As used in this Paragraph 8, the term 'insuring party' shall mean the party who has the obligation to obtain the Property Insurance required hereunder. The insuring party shall be designated in Paragraph 46 hereof. In the event Lessor is the insuring party, Lessor shall also maintain the liability insurance described in paragraph 8.2 hereof, in addition to, and not in lieu of, the insurance required to be maintained by Lessee under said paragraph 8.2, but Lessor shall not be required to name Lessee as an additional insured on such policy. Whether the insuring party is the Lessor or the Lessee, Lessee shall, as additional rent for the Premises, pay the cost of all insurance required hereunder, except for that portion of the cost attributable to the Lessor's liability insurance coverage in excess of $1,000,000 per occurrence. If Lessor is the insuring party Lessee shall, within ten (10) days following demand by Lessor, reimburse Lessor for the cost of the insurance so obtained." Paragraph 46 identified the lessee, Ninjin, as the insuring party.

Paragraph 8.2 covered liability insurance. Paragraph 8.3 covered property insurance.[1]

---

[1] Specifically, paragraph 8.2 required the lessee to "obtain and keep in force" liability insurance. Paragraph 8.3 required the insuring party to "obtain and keep in force" property insurance and specified what it should cover.

Paragraph 8.5 contained a waiver of subrogation provision as follows: "Lessee and Lessor hereby release and relieve each other, and waive their entire right of recovery against the other for loss or damage arising out of or incident to the perils insured against under paragraph 8.3, which perils occur in, on or about the Premises, whether due to the negligence of Lessor or Lessee or their agents, employees, contractors and/or invitees. Lessee and Lessor shall, upon obtaining the policies of insurance required hereunder, give notice to the insurance carrier or carriers that the foregoing mutual waiver of subrogation is contained in this Lease."

According to the allegations of the complaint, Amco issued a property insurance policy to Carriere covering the leased property. On February 26, 2006, there was a fire at the property caused by Ninjin's negligence. Carriere made a claim on the policy, and Amco paid Carriere $297,313.40.

Amco then sued Ninjin to recover the money paid to Carriere. Ninjin moved for summary judgment based on paragraph 8.5 of the lease. Amco opposed summary judgment on several grounds but submitted no evidence in opposition to the motion. Instead, it argued that other provisions of the lease created factual questions. The trial court rejected these arguments and found Amco failed to make a prima facie showing of a triable issue of fact. It granted summary judgment for Ninjin.

DISCUSSION

Summary judgment properly is granted if there is no question of material fact and the issues raised by the pleadings may be decided as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) To secure summary judgment, a moving defendant may show that one or more elements of the cause of action cannot be established or that there is a complete defense to the cause of action. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar*, *supra*, at p. 849.) The defendant must "demonstrate that under no hypothesis is there a material factual issue

requiring a trial." (*Rosenblum v. Safeco Ins. Co*. (2005) 126 Cal.App.4th 847, 856; accord, *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.)

Once the moving defendant has met its burden, the burden shifts to the plaintiff to show that a triable issue of fact exists as to the cause of action or the defense thereto. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 849.) The plaintiff may not rely on his or her pleadings to meet this burden (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar*, *supra*, at p. 849), except to the extent they are uncontested by the opposing party (*Wiler v. Firestone Tire & Rubber Co.* (1979) 95 Cal.App.3d 621, 626). All doubts as to the propriety of granting the motion are resolved in favor of the opposing party. (*Hamburg v. Wal-Mart Stores, Inc.* (2004) 116 Cal.App.4th 497, 502.)

The papers submitted by the parties must set forth evidentiary facts. (*Sheppard v. Morgan Keegan & Co.* (1990) 218 Cal.App.3d 61, 67; see also *Miller v. Bechtel* (1983) 33 Cal.3d 868, 874.) "Mere conclusions of law or fact are insufficient to satisfy the evidentiary requirements for a summary judgment. . . ." (*Perkins v. Howard* (1991) 232 Cal.App.3d 708, 713; *Sheppard*, *supra*, at p. 67.) The purpose of the papers submitted on the motion is to show a party "has sufficient proof of the matters alleged to raise a question of fact." (*Gribin Von Dyl & Associates, Inc. v. Kovalsky* (1986) 185 Cal.App.3d 653, 663.)

On appeal from a summary judgment, we exercise our independent judgment in determining whether there are no triable issues of material fact and the moving party thus is entitled to judgment as a matter of law. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.) We must uphold the judgment if it is correct on any ground, regardless of the reasons the trial court gave. (*Continental Ins. Co. v. Columbus Line, Inc.* (2003) 107 Cal.App.4th 1190, 1196.)

The only evidence submitted on the summary judgment motion was a copy of the lease submitted by Ninjin, and on which Ninjin relied. Amco submitted no evidence in opposition to the motion.

Amco first contends there is a triable issue of fact "as to the validity of any provision seeking to excuse the negligence of the tenant." The sole case it cites in support of its contention, *Fire Ins. Exchange v. Hammond* (2000) 83 Cal.App.4th 313, does not assist it.

In *Fire Ins. Exchange v. Hammond*, *supra*, the court noted that "'[i]n the case of insurance, subrogation takes the form of an insurer's right to be put in the position of the insured in order to pursue recovery from third parties legally responsible to the insured for a loss which the insurer has both insured and paid.' [Citation.] 'The right of subrogation is purely derivative. An insurer entitled to subrogation is in the same position as an assignee of the insured's claim, and succeeds only to the rights of the insured. The subrogated insurer is said to "'stand in the shoes'" of its insured, because it has no greater rights than the insured and is subject to the same defenses assertable against the insured. Thus, an insurer cannot acquire by subrogation anything to which the insured has no rights, and may claim no rights which the insured does not have.' [Citation.]" (83 Cal.App.4th at p. 317.)

The court pointed out that "[i]n California, courts have held that a lessee is not responsible for negligently caused fire damages where the lessor and lessee intended the lessor's fire policy to be for their mutual benefit." (*Fire Ins. Exchange v. Hammond*, *supra*, 83 Cal.App.4th at p. 317.) That is the case here.

The lease required property insurance, for which Ninjin as lessee was to pay. (Pars. 8.1, 8.3.) Paragraph 8.5, the waiver of subrogation provision, by its language makes it clear that Carriere and Ninjin intended that the property insurance be for their mutual benefit, and they did not intend that Ninjin be liable to Carriere for negligently caused damages to the property: "Lessee and Lessor hereby *release and relieve each other*, and waive their entire right of recovery against the other for loss or damage arising out of or incident to the perils insured against under paragraph 8.3, which perils occur in, on or about the Premises, whether *due to the negligence* of Lessor or Lessee or their agents, employees, contractors and/or invitees." According to the principles expressed in *Fire Ins. Exchange v. Hammond*, *supra*, 83 Cal.App.4th at page 317, Ninjin is not liable

to Carriere for fire damages caused by its negligence, and Amco as insurer therefore has no right of subrogation to pursue Ninjin for the loss.

Amco argues that Ninjin is using the waiver of subrogation provision "as an escape and release of [its] responsibility under the lease and [its] negligence. [It is] alleging that [it] can be negligent, but if [Carriere] bought insurance, even though [Ninjin was] the one[] who [was] to pay for the loss and have insurance, that [it] can be excused from the breach of contract and negligence. This would never have been the intent of the parties under any stretch of the imagination." (Emphasis omitted.)

Amco's argument rests on a faulty premise—that Carriere paid for the insurance and bore the burden of Ninjin's negligence. Under the contract, however, as stated above, although Carriere purchased the insurance, Ninjin was to pay for it in its rent payments. By doing so, Ninjin, not Carriere, bore the responsibility for its negligence. There was nothing contrary to law in this arrangement. (*Fire Ins. Exchange v. Hammond*, *supra*, 83 Cal.App.4th at p. 317.) Further, Amco presented no evidence as to any contrary intent on the part of Carriere or Ninjin. Neither did Amco present evidence that Ninjin did not in fact pay for the insurance.

Amco also argues that "the Waiver was conditioned upon Ninjin insuring against loss and indemnifying as required under the lease. The entire case is based upon Ninjin's failure either individually or through [its] carrier to perform this very task. The condition has not been met for any waiver." Again, Amco presented no evidence Ninjin failed to fulfill its duty to insure against loss as required under the lease.

In summary, Amco failed to meet its burden of providing *evidence* raising a triable issue of material fact as to its cause of action sufficient to preclude summary judgment in Ninjin's favor. (Code Civ. Proc., § 437c, subd. (p)(2); *Perkins v. Howard*, *supra*, 232 Cal.App.3d at p. 713.) It also failed to meet its burden on appeal of showing the trial court erred in granting the summary judgment. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574; *Robbins v. Los Angeles Unified School Dist.* (1992) 3 Cal.App.4th 313, 318-319.) Consequently, we must uphold the judgment.

DISPOSITION

The judgment is affirmed. Defendants are to recover costs on appeal.

JACKSON, J.

We concur:

WOODS, Acting P. J.

SEGAL, J.*

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* Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.